16D C.J.S. Constitutional Law VIII XXII E Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Parent and Child 241 to 246

A.L.R. Library

A.L.R. Index, Artificial Insemination
A.L.R. Index, Ballots
A.L.R. Index, Due Process
A.L.R. Index, Elections and Voting
A.L.R. Index, Family, Relatives, and Household
A.L.R. Index, Fourteenth Amendment
A.L.R. Index, Freedom of Assembly
A.L.R. Index, Freedom of Speech and Press
A.L.R. Index, Marriage Licenses
A.L.R. Index, Travel
West's A.L.R. Digest, Constitutional Law 3840, 3841, 3850 to 3861, 3865, 3866, 3872, 4030, 4034 to 4037, 4041, 4042, 4230 to 4237, 4251, 4277, 4291, 4292, 4380 to 4404, 4450 to 4455, 4509(20), 4850 to 4858

End of Document

16D C.J.S. Constitutional Law § 2122

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

1. General Considerations

§ 2122. Due process considerations with respect to personal rights, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 3841, 3851 to 3861, 3865, 3866, 3872, 4030, 4037, 4041, 4042, 4251, 4450 to 4455, 4850 to 4858

Due process establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests.

In addition to the specific freedoms protected by Bill of Rights,[1] "liberty" specially protected by the Due Process Clause includes the rights to marry, have children, direct the education and upbringing of one's children, marital privacy, use contraception, bodily integrity, and abortion.[2] Thus, the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual,[3] subject to reasonable intrusions[4] by the State in furtherance of legitimate state interests.[5] In setting forth a claim alleging a violation of substantive due process, a party must show either that the challenged law infringes upon a fundamental right or liberties deeply rooted in history or that the law does not bear a substantial relation to legitimate state interests.[6]

In every due process challenge, the first inquiry is whether the plaintiff has been deprived of a protected interest in life, liberty, or property.[7] Once such deprivation occurs, postdeprivation remedies may satisfy due process in situations where a predeprivation

hearing is unduly burdensome in proportion to the liberty interest at stake or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest.[8] For intentional, as well as for negligent deprivations of property by a state's employees, the state's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy.[9]

The doctrine of fundamental fairness, which is an integral part of due process, is often extrapolated from or implied in other constitutional guarantees.[10] Whether an interest in benefits or protections provided by the government is entitled to due process protections depends on the nature of the governmental activity and citizen's dependency and reliance on that activity.[11] Individuals who seek to invoke the Fourteenth Amendment's procedural protection against a deprivation of an interest in life, liberty, or property must establish that such interest is at stake.[12]

The essence of due process is the requirement that notice and the opportunity to be heard[13] by an impartial adjudicator[14] be granted before a personal right is to be interfered with, although procedural due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest;[15] rather, due process is flexible and calls for such procedural protections as the particular situation demands.[16]

Bodily integrity.

The Supreme Court has held, in line with its later-announced due process right to bodily integrity,[17] that a competent adult has a constitutionally protected liberty interest in refusing unwanted medical treatment[18] although a minor does not have the right.[19]

The right to protect health may be encompassed within the fundamental liberties protected by due process.[20] In fact, under the danger doctrine, state actors may be held liable for a violation of an individual's due process-protected liberty interest in bodily integrity even though the actual physical injury of which the plaintiff complains is the direct result of violence perpetrated by private actors.[21] On the other hand, there is no right to assisted suicide, for purposes of a substantive due process analysis, because consistent and almost universal tradition has long rejected this asserted right and continues explicitly to reject it, even for terminally ill, mentally competent adults.[22]

Personal appearance.

The freedom to govern one's personal appearance, such as one's choice of clothing or grooming,[23] is generally an ingredient of liberty protected by the Due Process Clause. More specifically, the right to grow a beard,[24] or to determine the length and style of one's hair,[25] is an aspect of personal liberty protected by due process of law. Thus, in order for a government restriction on personal appearance to be valid, there must be a rational relationship between the restriction and a legitimate government interest sought to be achieved.[26]

Footnotes

1 U.S. Const. Amends. I to X.

2 U.S.—Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

3 Wis.—Weber v. City of Cedarburg, 129 Wis. 2d 57, 384 N.W.2d 333 (1986).

4 U.S.—Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).

5 U.S.—Words of Faith Fellowship, Inc. v. Rutherford County Dept. of Social Services, 329 F. Supp. 2d 675 (W.D. N.C. 2004).

Ariz.—Standhardt v. Superior Court ex rel. County of Maricopa, 206 Ariz. 276, 77 P.3d 451 (Ct. App. Div. 1 2003).

6 Ind.—Leone v. Commissioner, Indiana Bureau of Motor Vehicles, 933 N.E.2d 1244 (Ind. 2010).

As to substantive due process, see § 1821.

7 U.S.—American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130, 134 Ed. Law Rep. 461 (1999).

N.H.—In re Union Telephone Co., 160 N.H. 309, 999 A.2d 336 (2010).

Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).

Freedom to act on decisions without government interference

The personal liberty provided by the Fourteenth Amendment is not composed simply and only of freedoms considered fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference.

U.S.—Dwen v. Barry, 483 F.2d 1126 (2d Cir. 1973).

8 U.S.—Zinermon v. Burch, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990).

9 Mo.—Investors Title Co., Inc. v. Hammonds, 217 S.W.3d 288 (Mo. 2007).

10 N.J.—State v. Miller, 216 N.J. 40, 76 A.3d 1250 (2013), cert. denied, 134 S. Ct. 1329, 188 L. Ed. 2d 339 (2014).

11 Pa.—Pennsylvania Coal Min. Ass'n v. Insurance Dept., 471 Pa. 437, 370 A.2d 685 (1977).

12 U.S.—Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005).

13 U.S.—Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, 10 U.C.C. Rep. Serv. 913 (1972).

Ind.—Haegert v. University of Evansville, 977 N.E.2d 924, 286 Ed. Law Rep. 660 (Ind. 2012).

Tenn.—Moncier v. Board of Professional Responsibility, 406 S.W.3d 139 (Tenn. 2013).

R.I.—In re McKenna, 110 A.3d 1126 (R.I. 2015).

Utah—Nevares v. M.L.S., 2015 UT 34, 345 P.3d 719 (Utah 2015).

Wash.—In re Welfare of S.E., 63 Wash. App. 244, 820 P.2d 47 (Div. 3 1991).

14 U.S.—Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993).

Me.—Jusseaume v. Ducatt, 2011 ME 43, 15 A.3d 714 (Me. 2011).

Neb.—Linda N. on behalf of Rebecca N. v. William N., 289 Neb. 607, 856 N.W.2d 436 (2014).

15 D.C.—In re Sibley, 990 A.2d 483 (D.C. 2010).

16 S.C.—Kurschner v. City of Camden Planning Com'n, 376 S.C. 165, 656 S.E.2d 346 (2008).

17 U.S.—Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

18 U.S.—Cruzan by Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

19 U.S.—Novak v. Cobb County-Kennestone Hosp. Authority, 849 F. Supp. 1559 (N.D. Ga. 1994), aff'd, 74 F.3d 1173 (11th Cir. 1996).

20 N.J.—Right To Choose v. Byrne, 165 N.J. Super. 443, 398 A.2d 587 (Ch. Div. 1979).

21 U.S.—Sloane v. Kanawha County Sheriff Dept., 342 F. Supp. 2d 545 (S.D. W. Va. 2004).

22 U.S.—Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

23 U.S.—Hodge v. Lynd, 88 F. Supp. 2d 1234 (D.N.M. 2000).

Shirtlessness

Town ordinance prohibiting men from appearing in public without shirt was unconstitutional as applied to shirtless male runner.

U.S.—DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987).

24 U.S.—Carter v. Hodges, 317 F. Supp. 89 (W.D. Ark. 1970).

25 U.S.—Hayden ex rel. A.H. v. Greensburg Community School Corp., 743 F.3d 569, 302 Ed. Law Rep. 61 (7th Cir. 2014).

Mass.—Board of Selectmen of Framingham v. Civil Service Commission, 366 Mass. 547, 321 N.E.2d 649 (1974).

26 U.S.—Hodge v. Lynd, 88 F. Supp. 2d 1234 (D.N.M. 2000).

End of Document

16D C.J.S. Constitutional Law § 2123

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

1. General Considerations

§ 2123. Due process considerations with respect to personal privacy rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3840, 3841, 3851 to 3861, 3865, 3866, 3872, 4030, 4037, 4041, 4042, 4251, 4450 to 4455, 4850 to 4858

The constitutional guaranty of due process protects against invasion of the right of privacy.

The due process guaranty includes the right of privacy under the Fifth and Fourteenth Amendments of the United States Constitution.[1] In terms of due process and equal protection, the right to privacy means a right to engage in certain highly personal activities.[2] It encompasses two different kinds of interests, one of which is an individual interest in avoiding disclosure of personal matters,[3] This interest is not violated unless an individual's interest in maintaining confidentiality outweighs the governmental interest in disclosure.[4] The other interest encompassed by the right to privacy is an interest in independence in making certain kinds of important decisions.[5]

It is a fundamental right,[6] that is, it is a right so central to an individual's freedom that neither liberty nor justice would exist if it was sacrificed.[7] However, it is not an enumerated right,[8] and there is no general constitutional right to privacy that is protected

by substantive due process.[9] Any constitutional substantive due process right to privacy must be restricted to those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.[10]

Footnotes

1 U.S.—U.S. v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980).
As to family privacy, see § 2126.
As to privacy in relationship between foster parents and foster children, see § 2137.

2 S.C.—Burton v. York County Sheriff's Dept., 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004).

3 U.S.—Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

4 U.S.—In re State Police Litigation, 888 F. Supp. 1235 (D. Conn. 1995).

5 U.S.—Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

6 U.S.—Toffoloni v. LFP Publishing Group, LLC, 572 F.3d 1201 (11th Cir. 2009).

7 U.S.—John Gil Const., Inc. v. Riverso, 72 F. Supp. 2d 242 (S.D. N.Y. 1999).

8 U.S.—Skinner v. City of Miami, Fla., 62 F.3d 344 (11th Cir. 1995).

9 U.S.—Lynn v. O'Leary, 264 F. Supp. 2d 306 (D. Md. 2003).

10 U.S.—Jenkins v. Rock Hill Local School Dist., 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).

16D C.J.S. Constitutional Law § 2124

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

1. General Considerations

§ 2124. Due process considerations with respect to personal privacy rights—Informational privacy

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4450

Due process protection for an individual's interest in avoiding the disclosure of personal matters is known as the right to informational privacy.

The U.S. Supreme Court has assumed, without deciding, that the Constitution protects a right to informational privacy.[1] The touchstone of Fourteenth Amendment protection for informational privacy is whether the information at issue is within an individual's reasonable expectations of confidentiality; the more intimate or personal the information, the more reasonable the expectation is that it will remain confidential.[2] Privacy claims under the Fourteenth Amendment necessarily require fact-intensive and context-specific analyses, and bright lines generally cannot be drawn.[3] When determining whether the government interest in disclosure of an individual's personal matters outweighs the individual's privacy interest under the Fourteenth Amendment, a court considers the following facts: (1) the type of record requested, (2) the information it does or might contain, (3) the potential for harm in any subsequent nonconsensual disclosure, (4) the injury from disclosure to the relationship in which the record was generated, (5) the adequacy of safeguards to prevent unauthorized disclosure, (6) the degree of need for

access, and (7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.[4]

The Fourteenth Amendment right to privacy is generally limited to information about oneself, and to the extent that right applies to information about others, it is limited to one's decision not to share that information.[5]

Footnotes

1 U.S.—National Aeronautics and Space Admin. v. Nelson, 562 U.S. 134, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011).

2 U.S.—Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011).

3 U.S.—Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011).

4 U.S.—Doe v. Luzerne County, 660 F.3d 169 (3d Cir. 2011); Coons v. Lew, 762 F.3d 891 (9th Cir. 2014), as amended, (Sept. 2, 2014).

5 U.S.—Malleus v. George, 641 F.3d 560, 268 Ed. Law Rep. 71 (3d Cir. 2011), as amended, (June 6, 2011).

16D C.J.S. Constitutional Law § 2125

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

1. General Considerations

§ 2125. Due process considerations with respect to right to travel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4036

The right to travel is a part of the liberty of which a person cannot be deprived without due process of law.

The right to travel is a fundamental right[1] and a part of the liberty of which a person cannot be deprived without due process of law[2] and is closely related to the rights of free speech and association.[3] It enjoys a unique and protected place in our national heritage[4] and is an important aspect of a citizen's liberty under the Fifth Amendment[5] and the Fourteenth Amendment.[6] Accordingly, restrictions on the right to travel cannot be dismissed by asserting that the right to travel can be fully exercised if the individual first gives up membership in a given association.[7]

Use of passport.

Although the right to international travel is a liberty interest protected under the Fifth Amendment, it does not carry the same degree of protection as travel within the United States.[8] Even though cancellation of a purported citizen's United States passport implicates a specific liberty interest, namely, the right to travel internationally,[9] the government may, without violating due

process, refuse to validate a citizen's passport for travel to a foreign country.[10] This is so because United States passports are not the property of the individuals to whom they are issued and do not implicate any property interests under the Due Process Clause.[11] The fact that such refusal renders the flow of information concerning the foreign country less than wholly free, however, is a factor to be considered in determining whether the citizen has been denied due process of law.[12]

A statute providing for denial of a passport to a parent who is substantially in arrears in child support does not deny procedural due process because of the important governmental interest in enforcing child support orders.[13]

Currency transactions.

Although a restriction on the right to travel is the means used to curtail the flow of hard currency to a particular foreign country, the right of the executive to curtail such flow does not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment.[14]

CUMULATIVE SUPPLEMENT

Cases:

The substantive due process right to travel does not prevent toll roads, speed limits, or travel-related taxes. U.S. Const. Amend. 14. Hughes v. City of Cedar Rapids, Iowa, 840 F.3d 987 (8th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Moseley v. Price, 300 F. Supp. 2d 389 (E.D. Va. 2004).

2 U.S.—U.S. v. Laub, 385 U.S. 475, 87 S. Ct. 574, 17 L. Ed. 2d 526 (1967); NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461 (S.D. N.Y. 2004).

3 U.S.—Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); NYC C.L.A.S.H., Inc. v. City of New York, 315 F. Supp. 2d 461 (S.D. N.Y. 2004).
As to freedom of speech, press, assembly, and petition being within the due process guaranty, see § 2144.

4 U.S.—Johnson v. City of Cincinnati, 310 F.3d 484, 2002 FED App. 0332P (6th Cir. 2002).

5 Me.—Light v. D'Amato, 2014 ME 134, 105 A.3d 447 (Me. 2014).
N.Y.—Williams v. Department of Corrections and Community Supervision, 43 Misc. 3d 356, 979 N.Y.S.2d 489 (Sup 2014).
Okla.—Edmondson v. Pearce, 2004 OK 23, 91 P.3d 605 (Okla. 2004), as corrected, (July 28, 2004).

6 U.S.—Perez-Morciglio v. Las Vegas Metropolitan Police Dept., 820 F. Supp. 2d 1111 (D. Nev. 2011).
N.Y.—Williams v. Department of Corrections and Community Supervision, 43 Misc. 3d 356, 979 N.Y.S.2d 489 (Sup 2014).

7 U.S.—Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964).

8 U.S.—Emergency Coalition to Defend Educational Travel v. U.S. Dept. of the Treasury, 545 F.3d 4, 238 Ed. Law Rep. 45 (D.C. Cir. 2008).

9 U.S.—Atem v. Ashcroft, 312 F. Supp. 2d 792 (E.D. Va. 2004).

10 U.S.—Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

11 U.S.—Atem v. Ashcroft, 312 F. Supp. 2d 792 (E.D. Va. 2004).

12 U.S.—Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271, 14 L. Ed. 2d 179 (1965).

13 U.S.—Risenhoover v. Washington County Community Services, 545 F. Supp. 2d 885 (D. Minn. 2008).

14 U.S.—Regan v. Wald, 468 U.S. 222, 104 S. Ct. 3026, 82 L. Ed. 2d 171 (1984).

End of Document

16D C.J.S. Constitutional Law § 2126

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2126. Due process considerations with respect to marriage

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4380 to 4387

To deny the fundamental freedom to marry on an unsupportable basis deprives all of a state's citizens of liberty without due process of law. States are split as to whether denial of marriage to same-sex couples is unsupportable and thus a denial of due process.

Marriage is one of the basic civil rights of mankind, fundamental to our very existence and survival. To deny this fundamental freedom on an unsupportable basis deprives all of a state's citizens of liberty without due process of law.[1] Freedom of personal choice in matters of marriage and family life is protected by due process,[2] as is the fundamental right to procreate.[3]

Footnotes

1 U.S.—Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (regarding state restriction of right to marry to members of the same race).

2 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996); Bustamante v. Mukasey, 531 F.3d 1059 (9th Cir. 2008); Elwell v. Byers, 699 F.3d 1208 (10th Cir. 2012).
Cal.—In re Santos Y., 92 Cal. App. 4th 1274, 112 Cal. Rptr. 2d 692 (2d Dist. 2001) (rejected on other grounds by, In re A.B., 2003 ND 98, 663 N.W.2d 625 (N.D. 2003)).
Nev.—Arata v. Faubion, 123 Nev. 153, 161 P.3d 244 (2007).

3 U.S.—Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005).
N.J.—Sojourner A. v. New Jersey Dept. of Human Services, 177 N.J. 318, 828 A.2d 306 (2003).
Pa.—Nixon v. Com., 576 Pa. 385, 839 A.2d 277 (2003).

End of Document

16D C.J.S. Constitutional Law § 2127

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2127. Due process considerations with respect to marriage—Same-sex marriage as right under Fourteenth Amendment's Due Process and Equal Protection Clauses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4380 to 4387
West's Key Number Digest, Marriage and Cohabitation 227(1), 227(2), 258, 259, 267, 301, 1262, 1269

The U.S. Supreme Court has, in a 2015 decision, held that the right to marry, being a fundamental right, must also apply to same-sex couples.

In a consolidated appeal from the Sixth Circuit, the U.S. Supreme Court in 2015 ruled that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to license marriages between two people of the same sex.[1] Further, the Fourteenth Amendment requires states to recognize a marriage between two people of the same sex where the marriage was lawfully licensed and performed out-of-state.[2]

In the wake of the Court's 2013 decision in *U.S. v. Windsor*, a number of courts had already begun requiring that state marriage laws begin treating same-sex and opposite-sex couples equally, thus eliminating the discretion of the states to restrict marriages to opposite-sex couples.[3] In *Windsor*,[4] the Supreme Court held that a surviving spouse of a same-sex couple was wrongfully denied the benefit of a spousal tax deduction because federal statutes provide that a "marriage" may only be between people of

the opposite sex. Such provision was held unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment's Due Process Clause.[5]

Footnotes

1 U.S.—Obergefell v. Hodges, 135 S. Ct. 2584, 2015-1 U.S. Tax Cas. (CCH) P 50357, 115 A.F.T.R.2d 2015-2309 (2015).

2 U.S.—Obergefell v. Hodges, 135 S. Ct. 2584, 2015-1 U.S. Tax Cas. (CCH) P 50357, 115 A.F.T.R.2d 2015-2309 (2015).

3 U.S.—Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), cert. denied, 135 S. Ct. 286, 190 L. Ed. 2d 140 (2014) and cert. denied, 135 S. Ct. 308, 190 L. Ed. 2d 140 (2014) and cert. denied, 135 S. Ct. 314, 190 L. Ed. 2d 140 (2014); Bishop v. Smith, 760 F.3d 1070 (10th Cir. 2014), cert. denied, 135 S. Ct. 271, 190 L. Ed. 2d 139 (2014); Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014), cert. denied, 135 S. Ct. 265, 190 L. Ed. 2d 138 (2014); Strawser v. Strange, 44 F. Supp. 3d 1206 (S.D. Ala. 2015) (regarding Alabama's marriage law).

4 U.S.—U.S. v. Windsor, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

5 U.S.—U.S. v. Windsor, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).

End of Document

16D C.J.S. Constitutional Law § 2128

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2128. Due process considerations with respect to parent-child relationship

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4380, 4389 to 4404

The right to maintain family integrity and freedom of personal choice in matters involving family life is a liberty interest protected by due process of law.

The right to maintain family integrity,[1] and family relationships generally,[2] are liberty interests protected by the due process guaranty. Nevertheless, the constitutional liberty interest in family integrity is neither absolute[3] nor forever free from state interference.[4]

Parenthood,[5] or the parent-child relationship;[6] the fundamental nature of parental rights;[7] the right to, or interest in, the custody, care,[8] management,[9] and control of children;[10] and the right to raise one's children,[11] are situations protected by or implicating the due process guaranty. Accordingly, any deprivation of such rights may be sustained only if the requirements of due process have been met.[12]

Particular constitutional provisions, statutes, regulations, or matters relating to family, marriage, and sexual matters have been considered violative of due process,[13] such as a statute authorizing the summary seizure of a child under stated conditions,[14] an accelerated timetable for appeal and other more restrictive procedures in a statute governing appeals in parental rights termination cases,[15] and a statutory presumption that unmarried fathers are unsuitable and neglectful parents.[16]

On the other hand, various other particular statutes, regulations, or matters do not violate due process of law,[17] such as a statute requiring, in an action for dissolution of a marriage or civil union, legal separation, or annulment, or for an application for custody or visitation, that parents attend a parenting education program designed by the judicial branch;[18] a statute barring determination of the paternity of a sperm donor and a donor's parental rights absent a written agreement between the mother and the sperm donor;[19] a statute proscribing taking a child under a specified age from its mother, in the case of a child born out of wedlock and not subsequently legitimated;[20] a statute barring a spouse against whom a decree of separation is rendered from inheriting an intestate share from the other spouse or taking an election;[21] and a statutory presumption of issue born in wedlock.[22]

Education of child.

The right of parents to guide the education of their children is a fundamental right protected by due process;[23] thus, a parent has a protected fundamental right to send a child to a school of the parent's choice if the school meets state quality and curriculum standards.[24] However, once parents make the choice as to which school their children will attend, their fundamental due process right to control the education of their children is, at the least, substantially diminished.[25] Circumstances may exist in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents, and should the school policies conflict with the parents' liberty interest, the policies may prevail if they are tied to a compelling interest.[26]

CUMULATIVE SUPPLEMENT

Cases:

Statements by social worker to parent of children, why are all black families so quick to spank their children? You are unfit to be parents and dont deserve to have children, and I am going to do everything in my power to see that the children are never returned to your custody, after initiating and pursuing Minnesota Child in Need of Protection or Services (CHIPS) proceeding that interfered with father's liberty interest in care, custody, and management of his children did not shock the conscience, and therefore it did not violate parent's substantive due process rights, since statement occurred during course of county's child abuse investigation. U.S. Const. Amend. 14; Minn. Stat. Ann. §§ 260C.148(2), 260C.163, 260C.175(1), 260C.178, subd. 1(a). Mitchell v. Dakota County Social Services, 959 F.3d 887 (8th Cir. 2020).

Child's interest in his or her relationship with parent is sufficiently weighty by itself to constitute a cognizable liberty interest, of kind protected by the Constitution. Hardwick v. County of Orange, 980 F.3d 733 (9th Cir. 2020).

Trial court's participation in questioning of witnesses at adjudicatory hearing in child protection matter was not fundamental error that deprived mother of due process. U.S.C.A. Const.Amend. 14; West's F.S.A. § 90.615(2). R.W. v. Department of Children & Families, 189 So. 3d 978 (Fla. 3d DCA 2016).

Parents have a constitutional right under the Due Process Clauses of the United States and Georgia Constitutions to the care and custody of their children. U.S. Const. Amend. 14; Ga. Const. art. 1, § 1, para. 1. Oni v. Oni, 351 Ga. App. 400, 830 S.E.2d 775 (2019).

The State may not deprive a parent of the fundamental liberty interest in the care, custody, and control of a child without providing a fair procedure for the deprivation. U.S. Const. Amend. 14, Haw. Const. art. 1, § 5. DJ v. CJ, 147 Haw. 2, 464 P.3d 790 (2020).

The mere existence of a biological link between parent and child does not, in and of itself, merit substantial protection under the Fourteenth Amendment's Due Process Clause; instead, a biological link offers biological fathers an opportunity to develop a relationship with his offspring. U.S. Const. Amend. 14. Castro v. Lemus, 2019 UT 71, 456 P.3d 750 (Utah 2019).

Due process prohibits a court from indefinitely suspending all contact between a parent and child without first finding by clear and convincing evidence that any contact would be against the child's best interests. U.S. Const. Amend. 14; 15 Vt. Stat. Ann. § 650. Wright v. Kemp, 2019 VT 11, 207 A.3d 1021 (Vt. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Morris v. Dearborne, 181 F.3d 657, 136 Ed. Law Rep. 693 (5th Cir. 1999).
Me.—Rideout v. Riendeau, 2000 ME 198, 761 A.2d 291 (Me. 2000).
Neb.—Amanda C. ex rel. Richmond v. Case, 275 Neb. 757, 749 N.W.2d 429 (2008).

2 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Roska ex rel. Roska v. Peterson, 328 F.3d 1230 (10th Cir. 2003).
Idaho—In re Termination of Parental Rights of Doe, 155 Idaho 896, 318 P.3d 886 (2014).
Ill.—In re Scarlett Z.-D., 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).
Ind.—In re I.P., 5 N.E.3d 750 (Ind. 2014).
Mass.—In re Guardianship of V.V., 470 Mass. 590, 24 N.E.3d 1022 (2015).
Ohio—In re B.C., 141 Ohio St. 3d 55, 2014-Ohio-4558, 21 N.E.3d 308 (2014).

3 U.S.—Kottmyer v. Maas, 436 F.3d 684, 2006 FED App. 0021P (6th Cir. 2006); Xiong v. Wagner, 700 F.3d 282 (7th Cir. 2012).
D.C.—W.H. v. D.W., 78 A.3d 327 (D.C. 2013).
Me.—Rideout v. Riendeau, 2000 ME 198, 761 A.2d 291 (Me. 2000).
Tex.—In re A.B., 437 S.W.3d 498 (Tex. 2014).

4 Me.—Rideout v. Riendeau, 2000 ME 198, 761 A.2d 291 (Me. 2000).

5 U.S.—U.S. v. Myers, 426 F.3d 117 (2d Cir. 2005); U.S. v. Wolf Child, 699 F.3d 1082 (9th Cir. 2012).
Utah—In re Baby Girl T., 2012 UT 78, 298 P.3d 1251 (Utah 2012).

6 Ill.—In re Scarlett Z.-D., 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).
Mich.—In re Sanders, 495 Mich. 394, 852 N.W.2d 524 (2014).
Neb.—Stacy M. v. Jason M., 290 Neb. 141, 858 N.W.2d 852 (2015).
Tex.—In re B.G., 317 S.W.3d 250 (Tex. 2010).

7 Ill.—In re Scarlett Z.-D., 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).
Mass.—In re Guardianship of V.V., 470 Mass. 590, 24 N.E.3d 1022 (2015).
Wyo.—Matter of Adoption of JLP, 774 P.2d 624 (Wyo. 1989).

8 U.S.—Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
Ill.—In re Scarlett Z.-D., 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).
Mont.—In re S.H., 2003 MT 366, 319 Mont. 90, 86 P.3d 1027 (2003).
Neb.—Stacy M. v. Jason M., 290 Neb. 141, 858 N.W.2d 852 (2015).

Wash.—In re A.W., 182 Wash. 2d 689, 344 P.3d 1186 (2015).

9 U.S.—Maddox v. Stephens, 727 F.3d 1109 (11th Cir. 2013).
Md.—In re Adoption/Guardianship No. 6Z000045, 372 Md. 104, 812 A.2d 271 (2002).
Mich.—In re Sanders, 495 Mich. 394, 852 N.W.2d 524 (2014).
S.C.—South Carolina Dept. of Social Services v. Michelle G., 407 S.C. 499, 757 S.E.2d 388 (2014).
Wash.—In re A.W., 182 Wash. 2d 689, 344 P.3d 1186 (2015).

10 U.S.—Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45 (1st Cir. 2014).
Cal.—In re Marriage of Metzger, 224 Cal. App. 4th 1441, 169 Cal. Rptr. 3d 382 (2d Dist. 2014), as modified on denial of reh'g, (April 14, 2014) and (Mar. 25, 2014) and review filed, (April 14, 2014) and (Apr. 25, 2014) and petition for certiorari filed, 135 S. Ct. 679, 190 L. Ed. 2d 390 (2014).
Ill.—In re Scarlett Z.-D., 2015 IL 117904, 390 Ill. Dec. 123, 28 N.E.3d 776 (Ill. 2015).
N.Y.—Price v. New York City Bd. of Educ., 51 A.D.3d 277, 855 N.Y.S.2d 530, 231 Ed. Law Rep. 856, 70 A.L.R.6th 683 (1st Dep't 2008).
Or.—In re Marriage of Epler, 356 Or. 624, 341 P.3d 742 (2014).
Pa.—In re D.C.D., 105 A.3d 662 (Pa. 2014).

11 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
Cal.—Suleman v. Superior Court, 180 Cal. App. 4th 1287, 103 Cal. Rptr. 3d 651 (4th Dist. 2010).
Fla.—D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).
Ill.—In re E.B., 231 Ill. 2d 459, 326 Ill. Dec. 1, 899 N.E.2d 218 (2008).
Me.—In re Guardianship of Jeremiah T., 2009 ME 74, 976 A.2d 955 (Me. 2009).
Md.—In re Adoption/Guardianship of Victor A., 386 Md. 288, 872 A.2d 662 (2005).
Mass.—In re Custody of Lori, 444 Mass. 316, 827 N.E.2d 716 (2005).

12 U.S.—Hayes v. County of San Diego, 736 F.3d 1223 (9th Cir. 2013).
Cal.—In re Adoption of Myah M., 201 Cal. App. 4th 1518, 135 Cal. Rptr. 3d 636 (1st Dist. 2011), as modified, (Jan. 6, 2012).
Conn.—Barros v. Barros, 309 Conn. 499, 72 A.3d 367 (2013).
Mass.—In re Guardianship of V.V., 470 Mass. 590, 24 N.E.3d 1022 (2015).
Mich.—In re Sanders, 495 Mich. 394, 852 N.W.2d 524 (2014).

13 Ill.—In re Marriage of Engelkens, 354 Ill. App. 3d 790, 290 Ill. Dec. 487, 821 N.E.2d 799 (3d Dist. 2004).
Mass.—In re Custody of Lori, 444 Mass. 316, 827 N.E.2d 716 (2005).

14 U.S.—Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976).

15 Tex.—In re B.G., 317 S.W.3d 250 (Tex. 2010).

16 U.S.—Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

17 U.S.—Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).

18 Conn.—Dutkiewicz v. Dutkiewicz, 289 Conn. 362, 957 A.2d 821 (2008).

19 Kan.—In re K.M.H., 285 Kan. 53, 169 P.3d 1025 (2007).

20 Wis.—State v. Hill, 91 Wis. 2d 446, 283 N.W.2d 451 (Ct. App. 1979).

21 N.Y.—Will of Granchelli, 90 Misc. 2d 103, 393 N.Y.S.2d 894 (Sur. Ct. 1977).

22 Cal.—Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (2d Dist. 1981).

23 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); Flaskamp v. Dearborn Public Schools, 385 F.3d 935, 192 Ed. Law Rep. 359, 2004 FED App. 0343P (6th Cir. 2004).
Ala.—Ex parte E.R.G., 73 So. 3d 634, 86 A.L.R.6th 651 (Ala. 2011).
N.C.—Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003).

24 Mich.—In re Proposal C., 384 Mich. 390, 185 N.W.2d 9 (1971).

25 U.S.—Fields v. Palmdale School Dist., 427 F.3d 1197, 203 Ed. Law Rep. 44 (9th Cir. 2005), opinion amended on denial of reh'g, 447 F.3d 1187, 209 Ed. Law Rep. 77 (9th Cir. 2006) (there is no fundamental due process right of parents to be the exclusive provider of information regarding sexual matters to their children).

26 U.S.—J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).

End of Document

16D C.J.S. Constitutional Law § 2129

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2129. Due process considerations with respect to artificial insemination

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4392
West's Key Number Digest, Parent and Child 241 to 246

A woman has a due process privacy right to become pregnant by means of artificial insemination, and a sperm donor may be permitted to exercise parental rights.

It has been held that a woman has a due process privacy right to become pregnant by means of artificial insemination.[1] A governmental policy that encourages children to be born into families with married parents is legitimate, but such a policy may not be permitted to overcome the constitutionally protected due process interest of a responsible, involved, unmarried mother or father.[2] Where unmarried biological parents together undertake the process of assisted conception, voluntarily execute an acknowledgement of paternity naming the sperm donor as the child's legal father, and together enter into a binding agreement regarding custody and care, prohibiting the sperm donor from ever establishing parental rights is contrary to the purpose of a statute on assisted conception and to the Due Process Clause.[3]

For purposes of due process, there is no compelling reason why a responsible, involved, unmarried, biological parent should never be allowed to establish legal parentage of a child born as a result of assisted conception.[4] However, a statute barring the

determination of paternity of a sperm donor and a donor's parental rights, absent a written agreement between the mother and sperm donor, does not violate due process as applied to the sperm donor.[5]

Footnotes

1 U.S.—Cameron v. Board of Educ. of Hillsboro, Ohio, City School Dist., 795 F. Supp. 228, 76 Ed. Law Rep. 1007 (S.D. Ohio 1991).

2 Va.—L.F. v. Breit, 285 Va. 163, 736 S.E.2d 711 (2013).

3 Va.—L.F. v. Breit, 285 Va. 163, 736 S.E.2d 711 (2013).

4 Fla.—D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).

5 Kan.—In re K.M.H., 285 Kan. 53, 169 P.3d 1025 (2007).

16D C.J.S. Constitutional Law § 2130

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2130. Due process considerations with respect to contraception and abortion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4380 to 4404, 4450 to 4455

A woman has a constitutional right of privacy to determine for herself whether to bear a child or terminate a pregnancy in its early stages.

A woman has a liberty interest[1] and a constitutional right of privacy to determine for herself whether to bear a child or terminate a pregnancy in its early stages,[2] before fetal viability.[3] Thus, an abortion decision and its implementation is a fundamental right of personal liberty protected by due process of law from deprivation or infringement by the state,[4] and various particular statutes, regulations, or matters relating to abortion have been deemed violative of due process of law.[5]

Although the Fourteenth Amendment protects a woman's right to choose to terminate her pregnancy prior to viability,[6] that right is not absolute,[7] and government regulation of abortions is allowed so long as it does not impose an undue burden on a woman's ability to choose.[8] The feebler the medical grounds for an abortion-related statute, the likelier it is that the burden on women seeking abortions, even if slight, will be an undue burden on the due process liberty interest in deciding whether

to terminate pregnancy, in the sense of being disproportionate or gratuitous, and it is not a matter of the number of women likely to be affected.[9]

Various statutes, regulations, and matters relating to abortion have been deemed not violative of due process of law,[10] and funding restrictions imposed by statute on the use of federal funds to reimburse the cost of abortions under the Medicaid program, or to do abortion counseling, do not impinge on the liberty interest of a woman to decide whether to terminate her pregnancy.[11] A statutory ban on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions may not contravene the United States Constitution.[12] Additionally, requiring parental notice by the physician performing an abortion does not violate due process of law.[13]

On the other hand, a state law banning all abortions, except when medical emergency exists, if a fetal heartbeat is detected, impermissibly infringes on a woman's due process right to choose to terminate a pregnancy before viability.[14] A statute banning all abortions, unless the pregnancy was the result of rape or incest, or the abortion was necessary due to medical emergency, if a fetal heartbeat was detected and the pregnancy had progressed to 12 weeks or more, and that required the physician to inform the pregnant woman about the 12-week abortion ban, and required the revocation of the medical license of any physician who violated the 12-week ban, was found to have impermissibly infringed on a woman's due process right to choose to terminate her pregnancy before viability.[15]

Contraception.

Women and men have a constitutional right to obtain contraceptives.[16] Access to contraceptives is an aspect of the right of privacy.[17] Thus, the Fourteenth Amendment accords constitutional protection to personal decisions relating to contraception.[18]

Footnotes

1 U.S.—Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

2 U.S.—Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (holding modified on other grounds by, Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)).

3 U.S.—Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992).

4 U.S.—Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973).

5 U.S.—Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978), judgment aff'd, 440 U.S. 941, 99 S. Ct. 1416, 59 L. Ed. 2d 630 (1979).

6 U.S.—Jackson Women's Health Organization Inc. v. Amy, 330 F. Supp. 2d 820 (S.D. Miss. 2004).

7 U.S.—Birth Control Centers, Inc. v. Reizen, 743 F.2d 352 (6th Cir. 1984); Edwards v. Beck, 8 F. Supp. 3d 1091 (E.D. Ark. 2014); McCormack v. Hiedeman, 900 F. Supp. 2d 1128 (D. Idaho 2013).

8 U.S.—Jackson Women's Health Organization Inc. v. Amy, 330 F. Supp. 2d 820 (S.D. Miss. 2004).

9 U.S.—Planned Parenthood of Wisconsin, Inc. v. Van Hollen, 738 F.3d 786 (7th Cir. 2013), cert. denied, 134 S. Ct. 2841, 189 L. Ed. 2d 807 (2014).

10 U.S.—Indiana Planned Parenthood Affiliates Ass'n, Inc. v. Pearson, 716 F.2d 1127 (7th Cir. 1983).

11 U.S.—Rust v. Sullivan, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991); Harris v. McRae, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

12 U.S.—Webster v. Reproductive Health Services, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989).

13 U.S.—Ohio v. Akron Center for Reproductive Health, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

14 U.S.—MKB Management Corp. v. Burdick, 16 F. Supp. 3d 1059 (D.N.D. 2014).

15 U.S.—Edwards v. Beck, 2015 WL 3395549 (8th Cir. 2015) (invalidating an Arkansas law).

16 U.S.—Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014).

17 U.S.—Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); Padgett v. Donald, 401 F.3d 1273 (11th Cir. 2005).

18 U.S.—Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003).
Conn.—Hammond v. Commissioner of Correction, 259 Conn. 855, 792 A.2d 774 (2002).

End of Document

16D C.J.S. Constitutional Law § 2131

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2131. Due process considerations with respect to determinations of paternity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4392

A judgment of paternity may not be entered without affording the putative father due process.

While a judgment of paternity may not be entered against a person without affording him due process,[1] due process considerations do not require that some time limit be placed on the exposure of putative fathers to paternity claims of illegitimate children.[2] Indeed, the adjudication of paternity of an illegitimate after the death of the alleged father does not deny due process.[3] In fact, the administrator of an estate may even have a duty to provide notice to known or reasonably ascertainable illegitimate children who are potential heirs and whose claims would be barred by the running of the statutory time period to file a paternity action.[4]

The putative father is not denied due process by the use, in civil paternity suits, of a discovery order compelling him to appear for the taking of his deposition,[5] of the preponderance of the evidence standard of proof,[6] requiring the payment of a jury fee by an indigent,[7] or permitting the rendition of a verdict by a nonunanimous jury.[8] In fact, a putative father has the burden of proof that he is unable to pay attorney's fees and a due process right to present evidence to carry that burden.[9]

A child is not denied due process by the failure to appoint a guardian ad litem to represent its interests in a paternity action.[10]

Appointment of counsel.

Because nonindigent paternity defendants have the right to be afforded a reasonable opportunity to secure representation of counsel,[11] an indigent defendant may be entitled to court-appointed counsel, in a paternity suit instituted or controlled by the state, under the due process guaranty.[12] Even so, some authority has made such appointment of counsel dependent on the particular circumstances of the case,[13] such as situations of particularized need,[14] the loss of personal freedom,[15] the deprivation of liberty,[16] or the risk of an erroneous deprivation of rights.[17] Lack of representation by counsel does not deprive an unmarried father of due process where the father is incarcerated and, once he is released, the order provides for the father to have contact with his children, and the order is subject to future modification.[18]

Standing and presumption as to child of marriage.

A statute denying a putative father standing to establish his paternity, or to seek custody or visitation rights, does not deprive him of due process where the child in question was conceived and born during the marriage of the child's mother to another, who does not disavow the child's legitimacy.[19] Furthermore, a statute declaring a presumption that a child born to a married woman living with her husband is a child of the marriage if the husband is not impotent or sterile does not violate the due process rights of a putative natural father.[20]

CUMULATIVE SUPPLEMENT

Cases:

Circuit court expanded scope of scheduled hearing in paternity proceeding without notice and thus violated mother's due process rights when, after entering "Order Scheduling Uncontested Final Hearing or in the Alternative Setting Status Conference," which stated that "[i]f an answer has been filed, this hearing will serve as a STATUS CONFERENCE," circuit court proceeded to final hearing and entry of final judgment notwithstanding that mother had filed answer. U.S. Const. Amend. 14. Pinnock v. Whyte, 209 So. 3d 71 (Fla. 3d DCA 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Stone v. Maher, 527 F. Supp. 10 (D. Conn. 1980).

2 Mass.—Com. v. Gruttner, 385 Mass. 474, 432 N.E.2d 518 (1982).
As to the rights of putative or unwed fathers, generally, see § 2132.

3 Ill.—Cody v. Johnson, 92 Ill. App. 3d 208, 47 Ill. Dec. 818, 415 N.E.2d 1131 (1st Dist. 1980).

4 Miss.—Estate of Thomas v. Thomas, 883 So. 2d 1173 (Miss. 2004).

5 Mich.—Larrabee v. Sachs, 201 Mich. App. 107, 506 N.W.2d 2 (1993).

6 U.S.—Rivera v. Minnich, 483 U.S. 574, 107 S. Ct. 3001, 97 L. Ed. 2d 473 (1987).

7 Conn.—Robertson v. Apuzzo, 170 Conn. 367, 365 A.2d 824 (1976).

8 Okla.—State v. McCain, 1981 OK 132, 637 P.2d 72 (Okla. 1981).

9 Fla.—Peterson v. Asklipious, 855 So. 2d 704 (Fla. 4th DCA 2003).

10 D.C.—Felder v. Allsopp, 391 A.2d 243 (D.C. 1978).

11 Pa.—White v. Gordon, 314 Pa. Super. 185, 460 A.2d 828 (1983).

12 Del.—Allen v. Division of Child Support Enforcement ex rel. Ware, 575 A.2d 1176 (Del. 1990).
Neb.—Carroll v. Moore, 228 Neb. 561, 423 N.W.2d 757 (1988).

13 Or.—State, ex rel. Adult and Family Services Division v. Stoutt, 57 Or. App. 303, 644 P.2d 1132 (1982).

14 N.Y.—Trent v. Loru, 57 Misc. 2d 382, 292 N.Y.S.2d 524 (Fam. Ct. 1968).

15 Or.—State, ex rel. Adult and Family Services Division v. Stoutt, 57 Or. App. 303, 644 P.2d 1132 (1982).

16 U.S.—U.S. v. Kerley, 2004 WL 187154 (S.D. N.Y. 2004).

17 Idaho—State Dept. of Health and Welfare ex rel. State of Or. v. Conley, 132 Idaho 266, 971 P.2d 332 (Ct. App. 1999).

18 Me.—Hatch v. Anderson, 2010 ME 94, 4 A.3d 904 (Me. 2010).

19 Del.—Petitioner F. v. Respondent R., 430 A.2d 1075 (Del. 1981).

20 U.S.—Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91 (1989).

End of Document

16D C.J.S. Constitutional Law § 2132

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2132. Due process considerations with respect to rights of putative or unwed fathers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4392

The interest of a putative father in his out-of-wedlock child is entitled to the protection of due process of law.

A biological father of an illegitimate child has a cognizable and substantial interest in the custody of his illegitimate children, and a denial of his right to notice and an opportunity to be heard with respect to such custody violates his constitutional right to due process.[1]

The putative father of child born out of wedlock has a due process right to notice of child's existence so as to allow father a chance to exercise his opportunity interest in developing a relationship with child.[2] The Due Process Clause protects a biological father's fundamental right to make decisions concerning the child's care, custody, and control despite his status as an unmarried sperm donor.[3]

An unwed biological father has an inchoate interest that develops into a fundamental right to be a parent protected by the state and United States constitutions when he demonstrates a commitment to raising the child by assuming parental responsibilities because his interest in personal contact with his child acquires substantial protection under the Due Process Clause.[4] If an unwed

father promptly comes forward and demonstrates a full commitment to his parental responsibilities, emotional, financial, and otherwise, his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent; absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship, and father's parental rights are entitled to equal protection as those of the mother.[5] However, the mere fact that an unmarried, biological father has paid his child support obligations is insufficient to create a fundamental liberty interest in a familial relationship that is entitled to heightened constitutional protection.[6]

Sperm donor.

A sperm donor who is known to his child as the child's father, and who has enjoyed considerable contact with the child at the instance of the child's mother, is entitled to an order of filiation as a matter of due process.[7]

Footnotes

1 U.S.—Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).
As to custody, generally, see § 2133.

2 Okla.—In re Adoption of K.P.M.A., 2014 OK 85, 341 P.3d 38 (Okla. 2014).

3 Va.—L.F. v. Breit, 285 Va. 163, 736 S.E.2d 711 (2013).

4 Fla.—D.M.T. v. T.M.H., 129 So. 3d 320 (Fla. 2013).

5 Cal.—J.R. v. D.P., 212 Cal. App. 4th 374, 150 Cal. Rptr. 3d 882 (2d Dist. 2012), review denied, (Apr. 10, 2013).

6 Neb.—Michael E. v. State, 286 Neb. 532, 839 N.W.2d 542 (2013) (disapproved of on other grounds by Anthony K. v. State, 289 Neb. 523, 855 N.W.2d 802 (2014)).

7 N.Y.—Thomas S. v. Robin Y., 209 A.D.2d 298, 618 N.Y.S.2d 356 (1st Dep't 1994).

16D C.J.S. Constitutional Law § 2133

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2133. Due process considerations with respect to custody of children

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4396, 4400, 4403.5

The right of parents to the custody of their children is a liberty interest protected by due process of law.

The right of parents to the custody of their children is a liberty interest protected by due process of law.[1] Therefore, a parent may not be deprived of custodial rights absent due process protections,[2] and due process is violated by a statute that authorizes the courts to award custody of minor children to third persons without a finding that the parents are unfit.[3] However, blood alone may not suffice to permit a parent to assert the due process right to custody and control of a child if the parent has altogether failed to shoulder the responsibilities inherent in parenthood.[4]

Due process requires hearing[5] and notice[6] before a parent may be deprived of the custody of a child. However, in emergency circumstances,[7] such as where there is an objectively reasonable basis for believing that a threat to the child's health or safety is imminent,[8] a child may be removed without such notice and hearing, provided a due process hearing is had as soon as the emergency has been resolved[9] or at a reasonably prompt time thereafter,[10] or within the time prescribed by statute.[11]

A parent has a due process right to confront and cross-examine all witnesses.[12] Thus, due process requires that parents have an opportunity to discover and challenge information forming the basis for the recommendation by a guardian appointed by the court to appear in a lawsuit on behalf of a minor.[13]

Appointment of counsel.

According to some courts, there is a constitutional right to appointed counsel in proceedings that may result in a loss of custody.[14] A trial court's failure to appoint counsel for a mother after she requested counsel and was found to be statutorily entitled to counsel by virtue of her indigency is a violation of due process.[15] According to other courts, however, there is no per se due process right to appointed counsel, where statutory procedures adequately reduce the risk of erroneous deprivation of the fundamental right to custody, in that trial court is not bound by technical rules of evidence, the proceedings are held before a judge without jury, adjudication of neglect or abuse is subject to continuing review, and the State's focus in the abuse and neglect proceedings is not termination of parental rights but restoration and reunification of the family[16] No appointment of counsel is required when no fundamental parental liberty interest is at stake, such as when primary custody is given to one parent, but the other parent also has significant custodial responsibilities.[17]

Due process does not require that all children involved in custody cases be provided with an independent counsel.[18] When the issue of appointment of counsel for children is properly raised under the relevant statute, the trial judge should weigh the private interests at stake, the state's interest, and the risk that the procedures used would lead to erroneous decisions, and apply those factors to each child's individual and likely unique circumstances to determine if the statute and due process require appointment of counsel.[19]

Cost of necessary experts.

A public defender's office may be liable for the reasonable costs of necessary experts to represent indigent parents in child abuse and neglect proceedings even if the parents are not represented by an attorney from that office.[20]

CUMULATIVE SUPPLEMENT

Cases:

Mother was not entitled to appointed counsel in child custody dispute between maternal grandmother and step-grandfather and mother; the case was a child custody case and not a termination of parental rights case, and mother's due process rights were not violated solely because maternal grandparents were represented by counsel and mother was representing herself. U.S. Const. Amend. 14; Alaska St. § 25.23.180(h). Dara v. Gish, 404 P.3d 154 (Alaska 2017).

While the right to the care and custody of one's own child is a fundamental right recognized by both the federal and state constitutions that clearly falls within the protections of the state and federal due process clauses and should be accorded significant weight in a parental rights termination case, custody hearings do not threaten termination of parental rights, and thus, while custody is a significant private interest, it does not reach the magnitude that a risk of termination does. U.S. Const. Amend. 14; Alaska Const. art. 1, § 7. Dennis O. v. Stephanie O., 393 P.3d 401 (Alaska 2017).

On petition to adjudicate children as dependent or neglected, under statutory ground that environment was injurious to children, due process did not require additional finding that neither parent was available, able, and willing to provide reasonable parental care. U.S. Const. Amend. 14; Colo. Rev. Stat. Ann. § 19-3-102(1)(c). People In Interest of J.G., 2016 CO 39, 370 P.3d 1151 (Colo. 2016).

Presumptive father's due process rights were not violated by delay in holding paternity hearing in context of dependency and neglect proceeding, although presumptive father did not receive treatment plan or departmental assistance, or an adjudicatory or dispositional hearing; presumptive father was not entitled to receive those, and received prior notice of the hearing date but did not appear, presumptive father's counsel was present and participated in hearing but called no witnesses, and presumptive father's counsel made a closing argument at the hearing. U.S. Const. Amend. 14; Colo. Rev. Stat. Ann. §§ 19-3-505(2), 19-3-507(1)(b), 19-3-508(1)(e)(I). People In Interest of M.B., 2020 COA 13, 459 P.3d 766 (Colo. App. 2020).

Trial court's order that changed mother's case-plan goal from reunification to adoption departed from the essential requirements of law, as required to merit certiorari review of the order, where mother was denied due process by not being put on notice that a change of case-plan goal would be considered at the hearing, and there was no evidentiary basis to support the change of case-plan goal from reunification to adoption order since the only testimony presented at the hearing was that of the children's guardian ad litem, who did not recommend a change of goal, guardian ad litem's report recommended that mother be reunified with the children, and Department of Children and Families' (DCF) Judicial Review Social Study Report presented at the hearing recommended reunification. U.S. Const. Amend. 14. A.M. v. Department of Children and Families, 252 So. 3d 797 (Fla. 3d DCA 2018).

Trial court's denial of mother's motion to set aside a new agreed parenting plan that gave primary custody of minor children to father after terminating evidentiary hearing midway violated mother's due process rights, where mother moved to set aside based on children's best interests, court conducted evidentiary hearing to make a determination, but court terminated proceedings during mother's cross-examination of Guardian Ad Litem for children. U.S. Const. Amend. 14. Haywood v. Bacon, 248 So. 3d 1254 (Fla. 5th DCA 2018).

Juvenile court did not afford parents their statutory right to counsel at judicial review in dependency proceedings, in violation of due process, thus rendering void order that, among other things, transferred temporary custody of children to county department of family and children services, though juvenile court had informed parents of their right to attorney; parents informed juvenile court that they had retained counsel who had asked parents to obtain continuance, juvenile court did not fully inquire as to whether parents were indigent and, thus, entitled to court-appointed attorney and did not delay proceedings to ascertain whether parents had acted with reasonable diligence in obtaining attorney's services, and record contained no colloquy in which parents waived their right to counsel. U.S. Const. Amend. 14; Ga. Code Ann. §§ 9-12-16, 15-11-103(g)(1, 2). In Interest of C. H., 343 Ga. App. 1, 805 S.E.2d 637 (2017).

Father's alleged receipt of only 12 minutes to present evidence during final fact-finding hearing in children in need of services (CHINS) proceeding did not violate due process, where, over the course of three days, father was able to examine and cross-examine multiple witnesses, and father testified at all three hearings. U.S. Const. Amend. 14. Matter of L.S., 82 N.E.3d 333 (Ind. Ct. App. 2017).

Divorce judgment which granted sole parental rights and responsibilities to wife was predicated on a best interest analysis and thus did not violate any constitutional due process interest on the part of the children, assuming such a procedural due process right to participate in the divorce proceeding existed. U.S.C.A. Const.Amend. 14; 19–A M.R.S.A. § 1653(3)(C). Pearson v. Wendell, 2015 ME 136, 125 A.3d 1149 (Me. 2015).

Default adjudication of neglect entered against mother who failed to attend scheduled conference in child neglect proceeding violated mother's fundamental due process rights, and thus default was nullity; although mother did not set forth meritorious defense for her failure to appear and was arguably on notice of conference, mother did not receive notice that potential fact-finding hearing might be conducted, and family court departed from proper course of conducting hearing in respondent's absence by accepting allegations in petition as proven by virtue of mother's default. U.S. Const. Amend. 14; N.Y. Family Court Act § 1042. Matter of Arra L., 183 A.D.3d 1027, 123 N.Y.S.3d 294 (3d Dep't 2020).

[END OF SUPPLEMENT]

Footnotes

1 Ill.—In re G.W., 357 Ill. App. 3d 1058, 294 Ill. Dec. 438, 830 N.E.2d 850 (2d Dist. 2005).
Ky.—Morgan v. Getter, 441 S.W.3d 94 (Ky. 2014).
Neb.—In re Dylan Z., 13 Neb. App. 586, 697 N.W.2d 707 (2005).
N.C.—Bennett v. Hawks, 170 N.C. App. 426, 613 S.E.2d 40 (2005).

2 U.S.—Doe v. Kearney, 329 F.3d 1286 (11th Cir. 2003).
Me.—Osier v. Osier, 410 A.2d 1027 (Me. 1980).
Mass.—In re Hilary, 450 Mass. 491, 880 N.E.2d 343 (2008).
Nev.—In re Parental Rights as to A.G., 295 P.3d 589, 129 Nev. Adv. Op. No. 13 (Nev. 2013).

3 Kan.—Sheppard v. Sheppard, 230 Kan. 146, 630 P.2d 1121 (1981).
W. Va.—In re Visitation and Custody of Senturi N.S.V., 221 W. Va. 159, 652 S.E.2d 490 (2007).

4 Neb.—Amanda C. ex rel. Richmond v. Case, 275 Neb. 757, 749 N.W.2d 429 (2008).

5 U.S.—Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000).

6 U.S.—Ellis v. Hamilton, 669 F.2d 510 (7th Cir. 1982).
Alaska—Childs v. Childs, 310 P.3d 955 (Alaska 2013).
Ill.—Suriano v. Lafeber, 386 Ill. App. 3d 490, 327 Ill. Dec. 361, 902 N.E.2d 116 (1st Dist. 2008).
Me.—Sparks v. Sparks, 2013 ME 41, 65 A.3d 1223 (Me. 2013).
R.I.—Desmond v. Brennan, 639 A.2d 1351 (R.I. 1994).

7 Ind.—Wardship of Nahrwold v. Department of Public Welfare of Allen County, 427 N.E.2d 474 (Ind. Ct. App. 1981).
Mass.—Caplan v. Donovan, 450 Mass. 463, 879 N.E.2d 117 (2008).
W. Va.—In re Timber M., 231 W. Va. 44, 743 S.E.2d 352 (2013).

8 U.S.—Kia P. v. McIntyre, 235 F.3d 749 (2d Cir. 2000).

9 N.Y.—Allen v. Allen, 83 A.D.2d 708, 442 N.Y.S.2d 261 (3d Dep't 1981).

10 U.S.—Yuan v. Rivera, 48 F. Supp. 2d 335 (S.D. N.Y. 1999).

11 Okla.—Dexter v. Rakestraw, 1978 OK 111, 583 P.2d 504 (Okla. 1978).

12 Ala.—C.E.T. v. K.M.T., 880 So. 2d 466 (Ala. Civ. App. 2003).
N.H.—In re Kosek, 151 N.H. 722, 871 A.2d 1 (2005).

13 N.H.—Ross v. Gadwah, 131 N.H. 391, 554 A.2d 1284 (1988).
Ohio—In re Dunikowski, 2002-Ohio-7050, 2002 WL 31838454 (Ohio Ct. App. 5th Dist. Guernsey County 2002).

14 Me.—In re T.B., 2013 ME 49, 65 A.3d 1282 (Me. 2013).
N.J.—New Jersey Div. of Youth and Family Services v. E.B., 264 N.J. Super. 1, 623 A.2d 1379 (App. Div. 1993), judgment aff'd, 137 N.J. 180, 644 A.2d 1093 (1994).

15 Ind.—In re G.P., 4 N.E.3d 1158 (Ind. 2014).

16 N.H.—In re C.M., 163 N.H. 768, 48 A.3d 942 (2012).

17 Wash.—King v. King, 162 Wash. 2d 378, 174 P.3d 659 (2007).

18 Pa.—Lewis v. Lewis, 271 Pa. Super. 519, 414 A.2d 375 (1979).
Alaska—Flores v. Flores, 598 P.2d 893 (Alaska 1979).

19 Wash.—In re Dependency of MSR, 174 Wash. 2d 1, 271 P.3d 234 (2012), as corrected, (May 8, 2012).

20 N.J.—New Jersey Div. of Youth and Family Services v. E.B., 264 N.J. Super. 1, 623 A.2d 1379 (App. Div. 1993), judgment aff'd, 137 N.J. 180, 644 A.2d 1093 (1994).

End of Document

16D C.J.S. Constitutional Law § 2134

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2134. Due process considerations with respect to custody of children—Allegations of child abuse

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4400, 4401

Serious allegations of child abuse that have been investigated and corroborated usually give rise to a reasonable inference of imminent danger sufficient to justify taking children into temporary custody without a warrant.

Serious allegations of child abuse that have been investigated and corroborated usually give rise to a reasonable inference of imminent danger sufficient to justify taking children into temporary custody without a warrant, without triggering a due process violation, if they might again be beaten or molested during the time it would take to get a warrant.[1]

The State owes no duty to a child whose abuse it is investigating to protect the child from a beating by a parent despite a claim that a special relationship exists between the child and the State.[2]

Due process does not always entitle persons accused of child molestation, whether in criminal proceedings or in dependency proceedings, to direct face-to-face confrontation and cross-examination of the children they are accused of molesting.[3] Allowing a child victim of alleged parental sexual abuse to testify, live, via two-way closed circuit television in civil abuse, neglect, or

dependency hearings does not violate the parent's right of due process.[4] Due process does not require that a parent, who is an alleged child abuser, be afforded the right to cross-examine a child, whose testimony is introduced in proceedings through a videotaped statement.[5]

CUMULATIVE SUPPLEMENT

Cases:

County violated parents' Fourteenth Amendment substantive due process right to family association when it performed invasive medical examinations of their minor children after removing them from family home under suspicion of child abuse without notifying parents about examinations and without obtaining either parents' consent or judicial authorization, even if examinations had health objective, where physician was looking for signs of physical and sexual abuse, there was no medical emergency or need to preserve evidence, and there was no indication that providing constitutionally adequate procedures posed administrative inconvenience. U.S. Const. Amend. 14. Mann v. County of San Diego, 907 F.3d 1154 (9th Cir. 2018).

Father's due process rights as a parent were negligible when county social workers, without a warrant, removed two-day-old child from custody of mother, who had a history of drug abuse, and thus there was no violation of father's substantive due process rights; just before giving birth, mother informed father that there was the possibility that someone else was the child's father, father lived and worked several hours away at the time, he returned home immediately after child's birth, and before his paternity was confirmed by court-ordered genetic test, he had minimal contact with mother and child and no responsibility for either's care. (Per Murguia, Circuit Judge, with one judge concurring, two judges concurring in result, and four judges concurring separately.) U.S. Const. Amend. 14. Kirkpatrick v. County of Washoe, 843 F.3d 784 (9th Cir. 2016).

Allegation that two Oklahoma Department of Human Services (ODHS) caseworkers would warn parents when an investigator was scheduled to arrive at their home to inspect the property and speak with the children residing there so that parents could clean their home and rehearse interviews with children was sufficient to state a cause of action for violation of children's substantive due process rights against caseworkers under state-created danger exception to rule that a state actor generally may not be held liable for harm a private actor inflicts on a victim; caseworkers' warnings to parents constituted affirmative conduct that increased children's vulnerability to abuse and neglect by parents. U.S. Const. Amend. 14. Matthews v. Bergdorf, 889 F.3d 1136 (10th Cir. 2018).

Process developed by state court judge for 48–hour hearings on removal of Indian children from homes, and implemented by state department of social services and its employees, violated due process rights of parents; judge and social services employees failed to protect Indian parents' fundamental rights to a fair hearing by not providing adequate notice, not allowing them to present evidence to contradict state's removal documents, not allowing parents to confront and cross-examine social services witnesses, using documents as a basis for court's decisions which were not provided to parents and which were not received in evidence at the 48–hour hearings. U.S.C.A. Const.Amend. 14. Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015).

Father's due process rights were not violated when the juvenile court conditioned a contested evidentiary hearing on father's offer of proof, in child dependency proceeding where father sought sole physical custody of child; the hearing considered whether court supervision would continue or, if terminated, with whom the children would live and the nature of visitation for the noncustodial parent, and while significant, the determinations did not represent father's final opportunity to avert termination of his parental rights, and thus conditioning the hearing on an offer of proof did not violate due process. U.S. Const. Amend. 14; Cal. Welf. & Inst. Code § 364. In re T.S., 52 Cal. App. 5th 503, 266 Cal. Rptr. 3d 170 (2d Dist. 2020).

Dismissal without prejudice of mother's complaint for protection of children from abuse against father did not deprive father of his parental rights without due process of law; father did not identify any legal authority to support the proposition that there was

protected liberty interest in being shielded from future litigation on complaint for protection from abuse when mother sought to dismiss initial complaint, and because there was no protected interest that inoculated father from future civil complaint arising from facts that had not previously been developed at trial, there could be no procedural due process violation. U.S. Const. Amend. 14; 19-A Me. Rev. Stat. § 4006. Doe v. Hills-Pettitt, 2020 ME 140, 243 A.3d 461 (Me. 2020).

In deciding due process requirements in a particular child dependency case, court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. U.S. Const. Amend. 14. In re Interest of Sloane O., 291 Neb. 892, 870 N.W.2d 110 (2015).

Parents' due process rights were not violated by trial court's failure to hold contested evidentiary hearing at temporary emergency care hearing on children in need of care or supervision petition, where, despite trial court's statement that evidentiary or contested hearing was available, neither of parents' attorneys requested evidentiary hearing or asked to submit evidence or call witnesses, and evidentiary hearing was not statutorily required. U.S.C.A. Const.Amend. 14; 33 V.S.A. § 5307(f). In re D.S., 2016 VT 38, 145 A.3d 828 (Vt. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Carter v. Lindgren, 502 F.3d 26 (1st Cir. 2007); Rogers v. County of San Joaquin, 487 F.3d 1288 (9th Cir. 2007); McCue v. South Fork Union Elementary School, 766 F. Supp. 2d 1003, 267 Ed. Law Rep. 660 (E.D. Cal. 2011).

2 U.S.—DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989).

3 Cal.—In re Elizabeth T., 9 Cal. App. 4th 636, 12 Cal. Rptr. 2d 10 (3d Dist. 1992).
Mich.—In re Brock, 442 Mich. 101, 499 N.W.2d 752 (1993).

4 Ohio—In re Burchfield, 51 Ohio App. 3d 148, 555 N.E.2d 325 (4th Dist. Athens County 1988).

5 Alaska—Matter of A.S.W., 834 P.2d 801 (Alaska 1992).

16D C.J.S. Constitutional Law § 2135

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2135. Due process considerations with respect to visitation rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4396

A fit parent has a due process right to control visitation.

For substantive due process purposes, noncustodial parents with court-ordered visitation rights have a liberty interest in the companionship, care, custody, and management of their children.[1] A noncustodial parent with visitation rights takes part in raising the child by making decisions about care, custody, and management during the period of the visitation, and thus has the sort of parental role that deserves to be protected as a liberty interest, for procedural due process purposes.[2] To deprive a parent of an out-of-wedlock child of visitation rights without a hearing would constitute a denial of due process.[3]

A fit parent has a due process right to control visitation;[4] at a minimum, the trial judge has to accord special weight to the parent's own determination of the children's best interests.[5]

Grandparent visitation.

A grandparent visitation statute has been held to violate the fundamental due process rights of parents, and thus be unenforceable, where it does not include a presumption in favor of the parents when deciding questions of visitation, looking only to a judge's determination of the best interests of the child, and not requiring a showing of a compelling state interest in awarding visitation.[6] Such a statute satisfies due process concerns where the procedure required to be followed provides clear notice to the custodial parent of the request for grandparent visitation and gives the custodial parent an opportunity to respond.[7] A statute recognizing grandparent standing as a parent for purposes of evaluating custody claims when the child has resided with the grandparent in a stable relationship, without first requiring a finding of parental unfitness, does not violate due process on its face.[8] To accord with due process, a grandparent visitation statute must be construed to contain a rebuttable presumption favoring parental decisions concerning visitation to be in child's best interests.[9] A court cannot rely solely on "best interest" and grandparent fitness factors in determining whether the parental presumption has been rebutted and still comport with due process.[10]

CUMULATIVE SUPPLEMENT

Cases:

Grandparent visitation statute did not violate a divorced father's federal or state substantive due process right to parent, as applied to grant paternal grandparents five overnight visits per month, to prohibit father from interfering with paternal grandparents attending or participating in the child's school, social, or athletic activities, and to require father to participate in anger management counseling at his own expense, even though there was no finding that father or mother was an unfit parent, where father had denied grandparents access to child out of "bitterness" with no evidence of culpable misconduct by grandparents, absent evidence that the visitation order had disruptive financial and practical day-to-day effects on father's and child's lives. U.S.C.A. Const.Amend. 14; West's Ann.Cal. Const. Art. 1, § 7; West's Ann.Cal.Fam.Code § 3104. Stuard v. Stuard, 244 Cal. App. 4th 768, 2016 WL 618646 (3d Dist. 2016).

Family Court did not deprive incarcerated father of due process by dismissing his petition for visitation at appearance at which there was defective audio connection, and father's voice could not be heard; father was represented by attorney who advocated for his interests, and since petition was dismissed without prejudice, father was free to file another petition. U.S.C.A. Const.Amend. 14. Bagot v. McClain, 148 A.D.3d 882, 49 N.Y.S.3d 175 (2d Dep't 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Brittain v. Hansen, 451 F.3d 982 (9th Cir. 2006).
2 U.S.—Swipies v. Kofka, 419 F.3d 709 (8th Cir. 2005).
3 W. Va.—J. M. S. v. H. A., 161 W. Va. 433, 242 S.E.2d 696 (1978).
4 Wash.—In re Parentage of C.A.M.A., 154 Wash. 2d 52, 109 P.3d 405 (2005).
5 U.S.—Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).
6 Ala.—Ex parte E.R.G., 73 So. 3d 634, 86 A.L.R.6th 651 (Ala. 2011).
7 N.D.—Kulbacki v. Michael, 2014 ND 83, 845 N.W.2d 625 (N.D. 2014).
8 Idaho—Hernandez v. Hernandez, 151 Idaho 882, 265 P.3d 495 (2011).
9 Md.—Koshko v. Haining, 398 Md. 404, 921 A.2d 171 (2007).
10 Utah—In re Estate of S.T.T., 2006 UT 46, 144 P.3d 1083 (Utah 2006).

End of Document

16D C.J.S. Constitutional Law § 2136

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2136. Due process considerations with respect to child support

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4396

Due process is not violated by the statutory imposition of a duty of child support on both parents.

A father's duty of child support commences at birth, and thus, a father's actual knowledge of the birth of a child for whom he bears legal responsibility is adequate notice of the accruing child support debt for due process purposes.[1] A putative father does not have a substantive due process right to disclaim fatherhood and thereby avoid paying child support.[2]

Due process is not violated by the statutory imposition of a duty of child support on both parents, even if one the father is not accorded a right either to decide that the fetus should be aborted or to later avoid child support obligations by showing that he offered to pay for an abortion during the first trimester of pregnancy.[3] An order requiring a mother to pay child support is properly entered in a proceeding changing custody from a mother to a father, and does not violate due process for lack of notice, even if the father's motion for change of custody does not request child support.[4]

The courts have validated a provision under which a parent who is in arrears in court ordered child support is to assign a portion of the parent's wages,[5] and the use of garnishment to enforce a support order, without notice and an opportunity for a hearing,

does not violate due process.[6] The temporary suspension of a parent's driver's license for failure to pay child support and delay in disbursing child support funds owed to the child does not violate the parent's procedural due process rights where adequate administrative process and judicial proceedings are available.[7]

A statute permitting a court to require the payment of child support past the age of majority while the child remains in high school does not violate due process.[8]

Footnotes

1 Alaska—Heustess v. Kelley-Heustess, 259 P.3d 462 (Alaska 2011).

2 U.S.—Dubay v. Wells, 506 F.3d 422, 69 Fed. R. Serv. 3d 405 (6th Cir. 2007).

3 Colo.—People in Interest of S. P. B., 651 P.2d 1213 (Colo. 1982).

4 Vt.—OCS/Glenn Pappas v. O'Brien, 193 Vt. 340, 2013 VT 11, 67 A.3d 916 (2013).

5 Cal.—In re Marriage of De More, 93 Cal. App. 3d 785, 155 Cal. Rptr. 899 (1st Dist. 1979).

6 Ariz.—Sanchez v. Carruth, 116 Ariz. 180, 568 P.2d 1078 (Ct. App. Div. 2 1977).

7 U.S.—Collins v. Saratoga County Support Collection Unit, 528 Fed. Appx. 15 (2d Cir. 2013).

8 Ark.—McFarland v. McFarland, 318 Ark. 446, 885 S.W.2d 897 (1994).

16D C.J.S. Constitutional Law § 2137

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2137. Due process considerations with respect to foster care

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4404

The interest of the parties in a foster parent relationship is not a constitutionally protected liberty interest.

Although there are circumstances which may lead to a different conclusion under state law,[1] generally the interest of the parties in a foster parent relationship,[2] or of foster parents in adoption,[3] is not a constitutionally protected liberty interest under the Fourteenth Amendment of the United States Constitution. This is so because foster parents have no justifiable expectation of a permanent relationship with their foster children free from state oversight or intervention.[4] Hence, a hearing is not required before a child may be removed from a foster home for the purposes of an adoption.[5] Even if statutes provide for notice and right to be heard, they do not guarantee any particular substantive outcome and, thus, do not create a constitutionally protected liberty interest for the preadoptive foster parents.[6] The procedure for the removal of a child from a foster home prescribed by state law has been declared to be within the requirements of due process.[7]

Foster care children have a due process protected liberty interest in minimally adequate shelter conditions and treatment while awaiting placement.[8] Furthermore, children in state-regulated foster homes have a substantive due process right to be free from

the infliction of unnecessary harm.[9] However, aspirational statutory, regulatory, and private standards for child welfare are not substantive due process requirements for a state's duties for the safety and general well-being of foster children.[10]

A statutory rebuttable presumption concerning a child who has been in continuous foster care for a specified period, that it is in the child's best interest to be placed in guardianship so that an adoption may be consented to, does not deny due process.[11]

Footnotes

1 U.S.—Rodriguez v. McLoughlin, 214 F.3d 328 (2d Cir. 2000).

2 U.S.—Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004).
Fla.—Buckner v. Family Services of Cent. Florida, Inc., 876 So. 2d 1285 (Fla. 5th DCA 2004).
Iowa—In Interest of A.C., 415 N.W.2d 609 (Iowa 1987).

3 U.S.—Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004).
Colo.—M.S. v. People, 2013 CO 35, 303 P.3d 102 (Colo. 2013).

4 U.S.—Lofton v. Secretary of Dept. of Children and Family Services, 358 F.3d 804 (11th Cir. 2004).

5 Mass.—Adoption of A Minor, 386 Mass. 741, 438 N.E.2d 38 (1982).

6 Colo.—M.S. v. People, 2013 CO 35, 303 P.3d 102 (Colo. 2013).

7 U.S.—Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977).

8 U.S.—Doe by Johanns v. New York City Dept. of Social Services, 670 F. Supp. 1145 (S.D. N.Y. 1987).

9 U.S.—Meador v. Cabinet for Human Resources, 902 F.2d 474 (6th Cir. 1990); Tamas v. Department of Social & Health Services, 630 F.3d 833 (9th Cir. 2010).

10 U.S.—Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45 (1st Cir. 2014).

11 Md.—Keeney v. Prince George's County Dept. of Social Services, 43 Md. App. 688, 406 A.2d 955 (1979).

16D C.J.S. Constitutional Law § 2138

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2138. Due process considerations with respect to adoption

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4395

A natural parent has a right, under the due process guaranty, to be given notice and an opportunity to be heard before being deprived of parental rights through an adoption proceeding.

A natural parent's liberty interest in raising the parent's children may be overridden, in a petition for an adoption to which a natural parent has not consented, only if there is clear and convincing evidence presented that continuing the parent-child relationship would be contrary to the best interests of the children and not merely that the adoption would be more beneficial to their interests.[1] Due process requires that a natural parent be given notice and an opportunity to be heard before being deprived of parental rights through an adoption proceeding.[2] However, substantial compliance with adoption laws is generally sufficient to satisfy due process requirements.[3] To preserve the parents' due process rights in the context of a contested adoption proceeding in which termination of parental rights is sought, the trial court must determine that the parent is unfit before making a finding that termination is in the best interest of the child.[4]

A statutory provision requiring an unwed father to file a paternity affidavit attesting to his ability and willingness to provide for the child in order to preserve the father's legal rights to prevent the adoption of his minor child does not unconstitutionally

infringe on the father's substantive due process rights where the affidavit requirement preserves a meaningful opportunity for the father to perfect his parental rights.[5] A statute allowing adoption to proceed if a birth parent's consent is withheld contrary to child's best interests meets due process scrutiny where relevant statutory factors focus on both the parent and the child and, therefore, compel a court to consider whether a parent's unfitness would be harmful to child's welfare.[6]

A statutory denial to parents, who have surrendered a child to an adoption agency, of notice and an opportunity for a hearing in the subsequent adoption proceeding does not deprive them of due process.[7] Indeed, parents who relinquish custody of child for adoption are afforded adequate procedural due process notwithstanding the adoption agency's noncompliance with regulations where the regulations violated are not necessary to insure a knowing, voluntary, and intelligent waiver of parental rights.[8] On the other hand, where the minor mother of an infant surrenders her child in a nonjudicial proceeding without benefit of a fiduciary or counsel, due process requires reaffirmance of the surrender in a judicial proceeding with the benefit of a guardian appointed to protect the minor's interests for the purposes of the case.[9]

Appointment of counsel.

Due process does not require the appointment of counsel for natural parents of a child prior to their consenting to the adoption of the child.[10] Due process also does not require that a birth mother be appointed counsel in a child's stepparent's petition to adopt the child, where the case has not been initiated by the State but by a third party, and the case is instituted as an adoption petition in probate court, not a termination of parental rights in juvenile court.[11] Furthermore, due process does not require the presence of an independent counsel to represent a child in every adoption proceeding.[12]

Prospective adoptive parents.

While prospective adoptive parents have a liberty interest in their family unit during the initial period that a child is placed with them, they do not have a due process right to a hearing prior to the removal of the child during the initial period of placement.[13]

CUMULATIVE SUPPLEMENT

Cases:

Trial court was not constitutionally required by due process clause of Maine to order provision of any particular services related to rehabilitation and reunification in private adoption proceeding brought by maternal grandmother to terminate parental rights of fathers for purposes of adoption of grandchildren; although fathers asserted that they should have received rehabilitation and reunification services prior to termination of parental rights, resources were limited to focus on cases in which state services were required. U.S. Const. Amend. 14, § 1; Me. Const. art. 1, § 6-A; 22 Me. Rev. Stat. § 4041. Adoption of Riahleigh M., 2019 ME 24, 202 A.3d 1174 (Me. 2019).

In context of adoption, a parent's liberty interest in care, custody and control of their children is satisfied under Fourteenth Amendment's Due Process Clause, if state statutes provide an unwed biological father with a meaningful chance to preserve his opportunity to develop a relationship with his child; Utah's adoption code does this by providing that an unwed natural father may acquire the right to consent to an adoption by satisfying certain statutory requirements, including initiating a paternity proceeding. U.S. Const. Amend. 14. Castro v. Lemus, 2019 UT 71, 456 P.3d 750 (Utah 2019).

[END OF SUPPLEMENT]

Footnotes

1 D.C.—In re Petition of W.D., 988 A.2d 456 (D.C. 2010).

2 Mass.—Adoption of Simone, 427 Mass. 34, 691 N.E.2d 538 (1998).

3 Ark.—Schrum v. Bolding, 260 Ark. 114, 539 S.W.2d 415 (1976).

4 Me.—In re Adoption of L.E., 2012 ME 127, 56 A.3d 1234 (Me. 2012).

5 Utah—In re Adoption of J.S., 2014 UT 51, 2014 WL 5573353 (Utah 2014).

6 Va.—Copeland v. Todd, 282 Va. 183, 715 S.E.2d 11 (2011).

7 La.—Golz v. Children's Bureau of New Orleans, Inc., 326 So. 2d 865 (La. 1976).

8 Cal.—Tyler v. Children's Home Society, 29 Cal. App. 4th 511, 35 Cal. Rptr. 2d 291 (3d Dist. 1994).

9 N.Y.—Matter of Adoption of Male L., 125 Misc. 2d 420, 479 N.Y.S.2d 661 (Sur. Ct. 1984).

10 Ill.—In re Hoffman's Adoption, 61 Ill. 2d 569, 338 N.E.2d 862 (1975).

11 Ohio—In re Adoption of Drake, 2003-Ohio-510, 2003 WL 231298 (Ohio Ct. App. 12th Dist. Clermont County 2003).

12 Or.—Matter of D., 24 Or. App. 601, 547 P.2d 175 (1976).

13 U.S.—Thelen v. Catholic Social Services, 691 F. Supp. 1179 (E.D. Wis. 1988).

End of Document

16D C.J.S. Constitutional Law § 2139

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2139. Due process considerations with respect to adoption—Consent

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1853, 4380 to 4404, 4450 to 4455

Due process may require that a birth parent be given the opportunity to withhold consent to the adoption of a child.

Due process may require that a birth parent be given the opportunity to withhold consent to the adoption of a child,[1] and the courts have validated a statute providing that consent by minor natural parents to adoption is as binding upon them as if such parents were in all respects of full age and capacity.[2] However, many statutes allow adoption to proceed if the birth parent's consent is withheld contrary to child's best interests, and such statutes have been found to withstand due process scrutiny in terms of protecting birth parents' liberty interests in their relationship with the child.[3] In order to grant a petition to dispense with parental consent to adopt, due process requires that the judge must find by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of the evidence, that a parent is currently unfit to provide for the welfare and best interests of the child.[4]

The application of the best interests of the child standard in permitting an adoption of such child does not violate the due process rights of the putative father who is not given the opportunity to withhold consent to the adoption.[5] Indeed, an unwed father has no federal constitutional right to withhold consent to an at-birth, third party adoption unless he shows that he promptly

came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child.[6]

Child in care of agency.

The presumption that the best interests of a child, who has been in the care of the Department of Social Services for more than one year, would be best served by dispensing with the need for parental consent to adoption violates the parent's due process rights because it shifts the burden to the parent affirmatively to prove fitness and to prove that the best interests of the child would be served by maintaining parental rights.[7]

Footnotes

1 Ark.—Olney v. Gordon, 240 Ark. 807, 402 S.W.2d 651 (1966).

2 Ga.—Ehrhart v. Brooks, 231 Ga. 272, 201 S.E.2d 464 (1973).

3 Va.—Copeland v. Todd, 282 Va. 183, 715 S.E.2d 11 (2011).

4 Mass.—In re Adoption of Fran, 54 Mass. App. Ct. 455, 766 N.E.2d 91 (2002).

5 U.S.—Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

6 Cal.—Adoption of Michael H., 10 Cal. 4th 1043, 43 Cal. Rptr. 2d 445, 898 P.2d 891, 61 A.L.R.5th 769 (1995).

7 Mass.—In re Erin, 443 Mass. 567, 823 N.E.2d 356 (2005).

16D C.J.S. Constitutional Law § 2140

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2140. Due process considerations with respect to termination of parental rights

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4403.5

Because the termination of parental rights implicates a fundamental liberty interest, the procedures utilized in connection with the permanent or temporary deprivation of parental rights must comply with the requirement of due process.

Because the termination of parental rights implicates a fundamental liberty interest[1] and is, therefore, a drastic measure,[2] the procedures utilized in connection with the permanent or temporary deprivation of parental rights must generally comply with the requirement of due process.[3] Nevertheless, the amount of process of law due a parent varies with the circumstances of the case.[4] To determine whether the procedures followed in a termination of parental rights proceeding satisfy due process, courts balance three factors: the importance of the individual interests that will be affected by the state action, the potential for error through the procedures used, and the magnitude of the state's interest.[5]

To preserve the parents' due process rights in the face of a possible termination of parental rights, a court must determine that the parent is unfit before making a finding that termination is in the best interest of the child.[6] Under certain circumstances, due

process requires that a hearing be held to determine the legal competency of the parent.[7] The state's interest in protecting the best interests of children enables it to investigate allegations of child abuse, to terminate the parent-child relationship if clear and convincing evidence of parental unfitness results from that investigation, and, in the interim, to separate child from parent prior to a hearing for cause shown, without violating the parents' due process rights.[8]

Review.

A statute providing that appellate review of a juvenile court's decision to terminate parental rights is discretionary and not as of right does not violate due process.[9] There is no due process requirement that service of a notice of appeal upon children be made a jurisdictional requisite to entertaining an appeal of an order terminating parental rights.[10] Due process requires the assistance and appointment of counsel in an appeal from a severance of parental rights proceeding where the parent is unable to afford an attorney.[11] Furthermore, where a statute provides that all parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel, this includes the right to seek judicial review of claims of incompetence of counsel.[12]

CUMULATIVE SUPPLEMENT

Cases:

Trial court's finding that father was depraved based on violent actions against his daughter's half brother, so as to support termination of father's parental rights to daughter, did not violate father's due process rights, although father was not the named perpetrator in half brother's case; father was afforded notice of proceedings related to torture of half brother, father was given opportunity to fully participate in proceedings, father's attorney was present at all proceedings and was permitted to cross-examine all witnesses, and naming of a specific perpetrator was not required for a finding of depravity under Juvenile Court Act. U.S. Const. Amend. 14; 705 Ill. Comp. Stat. Ann. 405/2-21(1). In re Faith S., 2019 IL App (1st) 182290, 436 Ill. Dec. 901, 143 N.E.3d 730 (App. Ct. 1st Dist. 2019).

Father was not denied due process as the result of the trial court allowing his court-appointed counsel to withdraw without filing a motion to withdraw, in termination of parental rights proceeding; the record showed that father had appeared at adjudication and dispositional hearings, he had received service plan, he had been admonished to comply with terms of the service plan or risk termination of his parental rights, he failed to remain in contact with his attorney, during the time his counsel had withdrawn from representing him, he was incarcerated and the only proceedings that took place were continuances for a status on mother's progress in obtaining a parenting assessment, the same counsel was reappointed to represent him, and he was fully represented at termination hearing. U.S. Const. Amend. 14; 705 Ill. Comp. Stat. Ann. 405/1-5(1); Ill. Sup. Ct. R. 13. In re S.P., 2019 IL App (3d) 180476, 429 Ill. Dec. 42, 123 N.E.3d 1101 (App. Ct. 3d Dist. 2019).

Father was not denied due process when he told the court at the beginning of the termination hearing that he was consenting to the termination of his parental rights as to the oldest child and the court responded that it was not sure it would accept his consent; father never raised the issue again. U.S. Const. Amend. 14. In re Children Troy P., 2019 ME 177, 222 A.3d 1056 (Me. 2019).

Father was not denied due process on the basis his parental rights were terminated based largely on evidence of an incident in which he injured the child, when he had the full opportunity to challenge the Department of Human Services' evidence that he inflicted the injuries and to present his own evidence on that point. U.S. Const. Amend. 14. In re Child of James R., 2018 ME 50, 182 A.3d 1252 (Me. 2018).

Mother's due process rights were not violated when the trial court considered the involuntary termination of mother's parental rights to her older child when determining whether to terminate parental rights to child; the record showed that the earlier termination order was one of several factors properly considered by the court along with ample evidence that mother had

abandoned the child. U.S. Const. Amend. 14. In re Zoey H., 2017 ME 159, 167 A.3d 1260 (Me. 2017), as corrected, (July 25, 2017).

Whether a district court violated a parent's right to due process in a proceeding to terminate parental rights is a question of constitutional law subject to plenary review. U.S. Const. Amend. 14. Matter of C.B., 2019 MT 294, 454 P.3d 1195 (Mont. 2019).

Parents do not have a constitutional due process right to appear at proceedings to terminate their parental rights, and their due process rights are satisfied if they are represented by counsel and have an opportunity to appear by deposition or other discovery technique; parent's right to appear may be satisfied by allowing an appearance via telephone. U.S.C.A. Const.Amend. 14. In re M.R., 2015 ND 233, 870 N.W.2d 175 (N.D. 2015).

Factor of private interest affected by the proceeding or official action weighed in favor of finding that incarcerated father did not receive due process in termination-of-parental-rights proceeding when trial court denied motion for continuance filed by father's counsel when father failed to appear despite being bench warranted, where father and child had an interest in the accuracy and justice of the decision to permanently end their relationship. U.S. Const. Amend. 14, § 1; Tex. Const. art. 1, § 19. Interest of L.N.C, 573 S.W.3d 309 (Tex. App. Houston 14th Dist. 2019).

Because of the strong presumption that maintaining the parent-child relationship is in the best interest of the child, and the due process implications of terminating a parent's rights, the evidence must be clear and convincing evidence that termination is in the child's best interest. U.S. Const. Amend. 14; Tex. Fam. Code Ann. § 161.001(b). In Interest of S.C. F., 522 S.W.3d 693 (Tex. App. Houston 1st Dist. 2017), rule 53.7(f) motion granted, (Aug. 8, 2017).

Biological father's parental interest in his child was at its strongest for purposes of determining whether presumption against appointment of counsel had been overcome and due process required appointment of counsel in termination of parental rights proceedings; father's right, as parent, to companionship, care, custody, and management of child was important interest and, thus, he had commanding interest in accuracy and justice of termination of parental rights proceedings, and there was some concern regarding risk of self-incrimination, where court found that father should have taken mother to court for refusing to facilitate visits but that he did not do so as he was afraid because he was on drugs and where court noted that father's extensive substance abuse was terms of neglect. U.S. Const. Amends. 5, 14; Utah Code Ann. §§ 62A-4a-201(1)(b, c), 78A-6-503(1), 78A-6-503(4), 78A-6-1111(1)(a). Adoption of K.A.S., 2016 UT 55, 390 P.3d 278 (Utah 2016).

Statute providing that the duties of a guardian ad litem (GAL) included making recommendations regarding, representing, and advocating for the best interests of the child, was not unconstitutionally vague, in violation of due process, as applied in termination of parental rights proceeding, though father asserted that former volunteer GAL's determination that in was in best interest of child, who was black, to be adopted by foster mother, who was white, was unconstitutionally affected by her implicit racial bias; best interests of child was case-specific and not statutorily defined, former volunteer GAL was not responsible for making final and binding determination, and only trial court was tasked with deciding what was in child's best interests. U.S. Const. Amend. 14; Wash. Rev. Code Ann. §§ 13.34.105(1)(e, f), 13.34.190(1). Matter of Dependency of A.E.T.H., 446 P.3d 667 (Wash. Ct. App. Div. 1 2019).

Limiting incarcerated father's participation in trial resulting in termination of his parental rights by only permitting father to participate by telephone during part of trial increased risk of erroneous termination, as would support determination that limiting father's participation violated his procedural due process rights; father was not able to testify in person and communicate with court in the same manner as state's witnesses, father was deprived of the ability to hear the vast majority of the state's evidence and was unable to meaningfully review and challenge that evidence, and there was no indication that court employed alternative procedures for father to review evidence and consult with counsel. U.S. Const. Amend. 14; Wash. Rev. Code Ann. § 13.34.090. Matter of Welfare of M.B., 467 P.3d 969 (Wash. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Cal.—In re R.T., 235 Cal. App. 4th 795, 185 Cal. Rptr. 3d 730 (2d Dist. 2015).
Ill.—In re S.L., 2014 IL 115424, 378 Ill. Dec. 451, 4 N.E.3d 50 (Ill. 2014).
Ky.—Cabinet for Health and Family Services v. K.H., 423 S.W.3d 204 (Ky. 2014).
Mont.—In re Adoption of C.W.D., 2005 MT 145, 327 Mont. 301, 114 P.3d 214 (2005).
R.I.—In re Isabella M., 66 A.3d 825 (R.I. 2013).

2 D.C.—In re Petition of W.D., 988 A.2d 456 (D.C. 2010).
Ill.—In re Gwynne P., 215 Ill. 2d 340, 294 Ill. Dec. 96, 830 N.E.2d 508 (2005).
Tex.—In re C.A.B., 289 S.W.3d 874 (Tex. App. Houston 14th Dist. 2009).

3 Pa.—In re D.C.D., 105 A.3d 662 (Pa. 2014).
Tex.—In Interest of C.A.J., 2015 WL 832211 (Tex. App. Texarkana 2015).
Wash.—In re Dependency of MSR, 174 Wash. 2d 1, 271 P.3d 234 (2012), as corrected, (May 8, 2012).

4 Minn.—Matter of Welfare of HGB, 306 N.W.2d 821 (Minn. 1981).

5 Ind.—In re G.P., 4 N.E.3d 1158 (Ind. 2014).
Me.—In re Priscilla D., 2010 ME 103, 5 A.3d 677 (Me. 2010).

6 Me.—In re Adoption of L.E., 2012 ME 127, 56 A.3d 1234 (Me. 2012).

7 Conn.—In re Alexander V., 223 Conn. 557, 613 A.2d 780 (1992).

8 U.S.—Lloyd v. Burt, 997 F. Supp. 2d 71 (D. Mass. 2014).

9 Ga.—In re N. A. U. E., 287 Ga. 797, 700 S.E.2d 393 (2010).

10 Or.—Matter of Shutts, 29 Or. App. 121, 563 P.2d 1221 (1977).

11 Kan.—In Interest of Cooper, 230 Kan. 57, 631 P.2d 632 (1981).

12 Cal.—In re Kristin H., 46 Cal. App. 4th 1635, 54 Cal. Rptr. 2d 722 (6th Dist. 1996).

16D C.J.S. Constitutional Law § 2141

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2141. Due process considerations with respect to termination of parental rights—Standard of proof

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4403.5

Due process generally requires at least clear and convincing evidence to support the requisite allegations before parental rights may be irrevocably terminated.

To reduce the risk of erroneous termination,[1] generally, due process requires at least clear and convincing evidence to support the requisite allegations before parental rights may be irrevocably terminated[2] although it is sufficient for the factual foundation of the requisite adjudication of dependency or neglect to be proven by a preponderance of the evidence when the grounds of termination are established by clear and convincing evidence.[3] In such a proceeding, "clear and convincing evidence" sufficient for termination of parental rights is the measure or degree of proof that produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. This heightened standard of proof is appropriate because termination is a drastic remedy of such weight and gravity that due process requires the state to justify termination of the parent-child relationship by more substantial proof than a preponderance of the evidence.[4] Thus, the preponderance of the evidence standard of proof does not satisfy due process of law.[5]

In certain circumstances, parents may only be required to prove their fitness by a preponderance of the evidence in order to rebut a statutory presumption of unfitness created by prior findings of unfitness.[6]

CUMULATIVE SUPPLEMENT

Cases:

Juvenile court violated mother's due process rights at termination of parental rights adjudication hearing by permitting her counsel to address only the weight of the evidence, not its admissibility, after determining that mother waived her legal rights based on her failure to appear at hearing. U.S. Const. Amend. 14; Ariz. Rev. Stat. Ann. § 8-863(C); Ariz. R. Juv. P. 66(D)(2). Brenda D. v. Department of Child Safety, 410 P.3d 419 (Ariz. 2018).

An unwed father has a federal constitutional right to due process prohibiting termination of his parental relationship in an adoption proceeding absent a showing of his unfitness as a parent, if the father has sufficiently and timely demonstrated a "full commitment" to his parental responsibilities, which requires (1) a demonstration of a willingness to financially support the child and (2) a willingness to emotionally support the unwed mother during her pregnancy, at least to the extent she makes possible. U.S. Const. Amend. 14. Adoption of T.K., 240 Cal. App. 4th 1392, 194 Cal. Rptr. 3d 606 (4th Dist. 2015), as modified on denial of reh'g, (Nov. 4, 2015) and review filed, (Nov. 18, 2015).

Trial court's active participation in termination of parental rights proceeding did not violate mother's due process rights, where proceeding was not criminal trial but was termination of parental rights proceeding in which best interest of child was paramount, and trial court appropriately questioned witnesses where necessary during six-day trial, managed time, understood evidence, and ascertained truth. U.S. Const. Amend. 14; Fla. Stat. Ann. §§ 90.612(1)(a), (b), 90.615(2). E.T. v. Department of Children and Families, 261 So. 3d 593 (Fla. 4th DCA 2019).

In termination of parental rights action, Department of Children and Family Services (DCFS) did not violate mother's due process rights when it terminated mother's reunification services under Juvenile Court Act after trial court had changed the goal of reunification to father; it was not fundamentally unfair for DCFS to terminate mother's reunification services when child was not scheduled to be reunified with mother. U.S. Const. Amend. 14; 705 Ill. Comp. Stat. Ann. 405/2-28(2). In re A.P.-M., 425 Ill. Dec. 68, 110 N.E.3d 1126 (App. Ct. 4th Dist. 2018).

Fact that trial court conducted hearing in termination of parental rights proceeding in absence of child's father, who was incarcerated out of state, did not violate father's due process rights; father was represented by counsel who cross-examined State's witnesses and argued vigorously on his behalf, based upon strength of State's case, it was highly unlikely that father's presence would have made any difference to outcome, and arranging for transport from out of state would have created lengthy delay in proceedings. U.S. Const. Amend. 14, § 1; 750 Ill. Comp. Stat. Ann. 50/1(D). In re J.M., 2020 IL App (2d) 190806, 440 Ill. Dec. 483, 153 N.E.3d 1059 (App. Ct. 2d Dist. 2020).

Father was not denied counsel without due process in termination of parental rights proceeding; father failed to establish that his due process rights to proper notice of his right to counsel were violated, as he was informed on multiple occasions of the right to counsel, and if he wanted counsel, all he had to do was make a telephone call, there was a greatly reduced risk of error in termination proceedings, even without counsel, and a more involved process would not have done much to advance father's interests while negatively affecting the interests of the child and the state through delay and unnecessary commitment of resources. U.S. Const. Amend. 14. Termination of Parent-Child Relationship of X.S. v. Indiana Department of Child Services, 117 N.E.3d 601 (Ind. Ct. App. 2018).

Minimal due process requirements were met, and therefore, even assuming mother's interest in timely permanency hearing was a constitutionally protected interest, she failed to show constitutional due process violation resulting from failure to hold hearing

within 30 days in child in need of care (CINC) case; court held full evidentiary hearing when it determined that reintegration was not viable, mother failed to argue what more she would or could have done with earlier opportunity to address the changed goal within 30 days of court's ruling that reintegration was no longer a viable alternative, and she had opportunity to fully litigate viability of reintegration before judge terminated her parental rights. U.S. Const. Amend. 14; Kan. Stat. Ann. § 38-2264(e). Interests of A.A.-F., 444 P.3d 938 (Kan. 2019).

Telephonic participation by father, who was incarcerated, during termination of parental rights proceeding did not deprive father of a meaningful opportunity to be heard in violation of due process; father was provided with notice of all hearing dates, father was represented by an attorney who was physically present at the courtroom and who cross-examined witnesses, and trial court made clear that it would take recesses to permit the father to consult with his attorney privately whenever he wished to do so. U.S. Const. Amend. 14; 18-A Me. Rev. Stat. § 9-204 (2017). Adoption by Jessica M., 2020 ME 118, 239 A.3d 633 (Me. 2020).

The trial court's failure to grant father a continuance of termination of parental rights hearing, after he was arrested at the courthouse shortly before the second day of the termination hearing, did not deprive father of his right to due process; father testified extensively during the first day of the hearing, all parties completed their examination of him, and father did not pursue any of the processes that were available to protect any due process right, such as seeking to augment the record with additional evidence or making an offer of proof. U.S. Const. Amend. 14. In re Children of Benjamin W., 2019 ME 147, 216 A.3d 901 (Me. 2019).

Father was not deprived of his due process right to a fair termination of parental rights hearing on the basis that he was powerless to exercise his right to respond to claims and evidence without giving up his constitutional right to incriminate himself [sic]; father was provided with notice of the issues to be addressed at the hearing, and he was represented by counsel and had a full opportunity to testify, to examine witnesses, and to respond to the evidence and the claims at issue at a hearing held before an impartial adjudicator. U.S. Const. Amend. 14. In re Scott A., 2019 ME 123, 213 A.3d 117 (Me. 2019).

Hearing in mother's absence on petition to terminate her parental rights did not violate due process; notice of hearing on petition was served on mother within time period prescribed by statute, notice stated that hearing would be held on petition and provided address of court and date and time of proceeding so that [she] may appear and be heard, petition warned that failure to appear could be deemed as intent to abandon child, which... may ultimately lead to termination of your parental rights, although docket record reflected that case management hearing was also scheduled, there was no indication in record that mother or her attorney received any notice from court that her attendance was not required at hearing, and mother failed to provide any explanation for her absence from court, in support of motion for new trial. U.S. Const. Amend. 14; 22 Me. Rev. Stat. §§ 4002(1-A), 4053. In re Child of Tanya C., 2018 ME 153, 198 A.3d 777 (Me. 2018).

Father was not incapacitated at trial on petition by state Department of Health and Human Services to terminate parental rights, as would implicate due process in regards to trial court's denial of father's motions to continue, where father received his substance-abuse treatment on the first day of trial, and where father testified and participated at trial. U.S. Const. Amend. 14, § 1; Me. Const. art. 1, § 6-A. In re Arturo G., 2017 ME 228, 175 A.3d 91 (Me. 2017).

Mother was afforded due process in termination of parental rights proceedings, despite claim that court made explicit finding of her parental fitness in amended order without first holding new hearing; mother was present at two-day hearing in which court found explicitly that termination of parental rights was in child's best interest and made findings concerning parental fitness, even though it did not explicitly find that mother was unfit parent at hearing, court found no new facts concerning mother's fitness in order, and mother fully participated in hearing from which facts underlying court's legal judgment in order were derived. U.S. Const. Amend. 14; 22 Me. Rev. Stat. § 4055(1)(B)(2)(a), (b)(i). In re Gabriel W., 2017 ME 133, 166 A.3d 982 (Me. 2017).

Father was not denied due process, in connection with termination of his parental rights, by fact that child was adjudicated as youth in need of care (YINC) prior to father personally being served with petition seeking adjudication and temporary legal custody (TLC); at hearing, father's counsel indicated that he had spoken to father and that father had no objection to the

relief sought, court left record open so that father could, after service, raise objections and request that court amend or rescind adjudication and TLC order, and father made no further objections or motions to amend or rescind the adjudication and TLC order after he was personally served with petition seeking adjudication and TLC. U.S. Const. Amend. 14. Matter of B.J.J., 2019 MT 129, 396 Mont. 108, 443 P.3d 488 (2019).

Decision by Department of Health and Human Services to supervise mother's visits given her observed inability to address her children's complex needs was not a violation of her due process rights in termination of parental rights proceeding. U.S.C.A. Const.Amend. 14. In re T.D.H., 2015 MT 244, 380 Mont. 401, 356 P.3d 457 (2015).

Substantial evidence supported trial court's determination that father was unable to parent his minor daughter, which was sufficient to support finding of current parental unfitness, as required by due process protections to terminate father's parental rights to daughter; evidence showed that Department of Social and Health Services provided father with all necessary available services and that despite receiving such services, father remained unable to parent daughter due to lack of attachment, and there was no evidence that any additional services would have remedied daughter's lack of attachment to father within daughter's foreseeable future. U.S. Const. Amend. 14; Wash. Rev. Code Ann. §§ 13.34.180(1), 13.34.190(1)(a)(i). Matter of K.M.M., 379 P.3d 75 (Wash. 2016).

Trial court's act in sua sponte modifying Section 5 disposition in abuse and neglect proceeding to a termination of parental rights violated both statute and parents' due process rights; statute did not authorize the circuit court to modify disposition on its own, in the absence of any motion, court provided no notice to the parties that it intended to take up a motion to modify disposition, sua sponte or otherwise, and court imposed a harsher disposition, despite the apparent improvement in parents circumstances from those at the conclusion of the previous dispositional hearing. U.S. Const. Amend. 14; W. Va. Code Ann. §§ 49-4-604(c)(5), 49-4-606. In re B.W., 854 S.E.2d 897 (W. Va. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Tex.—Latham v. Department of Family and Protective Services, 177 S.W.3d 341 (Tex. App. Houston 1st Dist. 2005).

2 Idaho—In re Doe, 157 Idaho 920, 342 P.3d 632 (2015).
Miss.—Chism v. Bright, 152 So. 3d 318 (Miss. 2014).
Mont.—In re Adoption of C.W.D., 2005 MT 145, 327 Mont. 301, 114 P.3d 214 (2005).
Pa.—In re D.C.D., 105 A.3d 662 (Pa. 2014).
R.I.—In re Lauren B., 78 A.3d 752 (R.I. 2013).
Tex.—In re K.M.L., 443 S.W.3d 101 (Tex. 2014).

3 Colo.—People in Interest of A. M. D., 648 P.2d 625 (Colo. 1982).

4 Tex.—Smith v. Texas Dept. of Protective and Regulatory Services, 160 S.W.3d 673 (Tex. App. Austin 2005).

5 U.S.—Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

6 Kan.—In Interest of L.D.B., 20 Kan. App. 2d 643, 891 P.2d 468 (1995).

16D C.J.S. Constitutional Law § 2142

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2142. Due process considerations with respect to determination of parental rights—Appointment of counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4403.5

The Constitution does not require the appointment of counsel in every termination of parental rights proceeding.

When the deprivation of parental status is at stake, counsel is sometimes part of the process that is due.[1] Generally, however, the Constitution does not require the appointment of counsel in every parental rights termination proceeding,[2] and the decision whether due process calls for the appointment of counsel for an indigent parent,[3] or independent counsel for the child,[4] in such proceedings must be determined by the trial court. According to some authorities, however, the right of impoverished parents to assistance of appointed counsel in termination proceedings is a basic right guaranteed by the due process provisions of the federal and state constitutions,[5] or just by the state constitution, irrespective of the Federal Constitution.[6] In any event, the appointment of counsel may be required if in a termination proceeding the parent's interests are at their strongest, the state's interest are at their weakest, and the risks of error are at their peak.[7]

CUMULATIVE SUPPLEMENT

Cases:

Family court did not infringe on father's due process rights by orally rendering decision to terminate father's parental rights without presence of his original trial attorney and immediately after appointing substitute counsel; even though original attorney had not yet withdrawn as counsel, court was not obligated to render decision from bench and could have filed written decision, court was not required to appoint substitute counsel after father had effectively discharged original attorney by filing a disciplinary complaint against him, court explicitly stated that substitute counsel would be granted leeway in terms of suggestions or motions then or in the very near future, and father was not prejudiced by original attorney's absence or by substitute counsel. U.S.C.A. Const.Amend. 14; Juv.Proceedings Rule 18(c). In re Jake G., 126 A.3d 450 (R.I. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996).

2 U.S.—Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

3 U.S.—Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

4 Or.—Matter of D., 24 Or. App. 601, 547 P.2d 175 (1976).

5 N.J.—New Jersey Div. of Youth and Family Services v. E.B., 264 N.J. Super. 1, 623 A.2d 1379 (App. Div. 1993), judgment aff'd, 137 N.J. 180, 644 A.2d 1093 (1994).

6 Haw.—In re T.M., 131 Haw. 419, 319 P.3d 338 (2014).

7 U.S.—Lassiter v. Department of Social Services of Durham County, N. C., 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

16D C.J.S. Constitutional Law § 2143

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

2. Marriage, Family, and Sexual Matters

§ 2143. Due process considerations with respect to discipline of children

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4391

The Fourteenth Amendment concept of liberty embraces the right of parents to discipline their children.

The right to discipline is inherent in the right to care, custody, and control of one's children as guaranteed by the due process clause of a state constitution.[1] However, a schoolchild has a liberty interest in freedom from corporal punishment such that the Fourteenth Amendment requires some procedural safeguards against its arbitrary imposition.[2] The Fourteenth Amendment concept of liberty embraces the right of parent to discipline their children,[3] but, according to some courts, such right is not a fundamental right.[4] According to other courts, however, parents' liberty interest in directing the upbringing and education of their children includes the right to discipline them by using reasonable, nonexcessive corporal punishment, and to delegate that parental authority to private school officials.[5]

Footnotes

1 Haw.—Hamilton ex rel. Lethem v. Lethem, 126 Haw. 294, 270 P.3d 1024 (2012).

2 U.S.—Baker v. Owen, 395 F. Supp. 294 (M.D. N.C. 1975), judgment aff'd, 423 U.S. 907, 96 S. Ct. 210, 46 L. Ed. 2d 137 (1975).

3 U.S.—Doe v. Heck, 327 F.3d 492 (7th Cir. 2003), as amended on denial of reh'g, (May 15, 2003).

4 U.S.—Baker v. Owen, 395 F. Supp. 294 (M.D. N.C. 1975), judgment aff'd, 423 U.S. 907, 96 S. Ct. 210, 46 L. Ed. 2d 137 (1975).

5 U.S.—Doe v. Heck, 327 F.3d 492 (7th Cir. 2003), as amended on denial of reh'g, (May 15, 2003).

End of Document

16D C.J.S. Constitutional Law § 2144

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

3. Freedom of Speech, Press, Assembly, and Petition

§ 2144. Due process issues regarding speech, press, assembly, and petition, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3850, 3851, 4034, 4035, 4277, 4291, 4292, 4509(20)

Due process protects various aspects of freedom of speech and of the press, and related rights, from governmental intrusion.

The Fourteenth Amendment imposes the First Amendment's substantive limitations on the states,[1] and conduct may be sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments.[2] Thus, symbolic expression of individuality is protected to the extent that due process prohibits an arbitrary deprivation of liberty.[3]

Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards.[4] Thus, any statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment of political discussion is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[5]

The subject-matter of a law determines how stringently the vagueness test will be applied; if, for instance, the challenged law infringes upon a fundamental right, such as liberty or free speech, a more stringent vagueness test is applied, whereas if the law

merely regulates business activity, a less stringent analysis is applied and more flexibility is allowed.[6] Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the Due Process Clause's void-for-vagueness doctrine demands a greater degree of specificity than in other contexts.[7] Attempts to prohibit immoral opinions or positions ordinarily are unconstitutionally vague, in violation of the Due Process Clause,[8] although perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.[9]

State election law.

The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization.[10] Therefore, when deciding whether a state election law violates First and Fourteenth Amendment associational rights, the court weighs the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden and considers the extent to which the State's concerns make the burden necessary.[11]

CUMULATIVE SUPPLEMENT

Cases:

Perfect clarity and precise guidance from regulations are not required to survive a due process vagueness challenge, even of regulations that restrict expressive activity. U.S. Const. Amends. 1, 14. Tracy v. Florida Atlantic University Board of Trustees, 980 F.3d 799 (11th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Santa Fe Independent School Dist. v. Doe, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295, 145 Ed. Law Rep. 21 (2000); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); McIntyre v. Ohio Elections Com'n, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).
Public figure prohibited from recovering damages
U.S.—Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988).

2 U.S.—Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

3 U.S.—Brick v. Board of Ed., School Dist. No. 1, Denver, Colo., 305 F. Supp. 1316 (D. Colo. 1969).
A.L.R. Library
Artist's speech and due process rights in artistic production which has been sold to another, 93 A.L.R. Fed. 912.

4 U.S.—National Endowment for the Arts v. Finley, 524 U.S. 569, 118 S. Ct. 2168, 141 L. Ed. 2d 500 (1998).

5 U.S.—Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).
Statute prohibiting discrimination does not target speech
U.S.—Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

6 Ark.—Abraham v. Beck, 2015 Ark. 80, 456 S.W.3d 744 (2015).

7 U.S.—Abdullah v. County of St. Louis, Mo., 52 F. Supp. 3d 936 (E.D. Mo. 2014).

8 U.S.—Women's Health Link, Inc. v. Fort Wayne Public Transp. Corp., 45 F. Supp. 3d 857 (N.D. Ind. 2014).

9 U.S.—Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014).

10 U.S.—Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986).

11 U.S.—Timmons v. Twin Cities Area New Party, 520 U.S. 351, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997).

End of Document

16D C.J.S. Constitutional Law § 2145

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

3. Freedom of Speech, Press, Assembly, and Petition

§ 2145. Due process issues regarding speech, press, assembly, and petition in streets and public places

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3850, 3851, 4034, 4035, 4277, 4291, 4292, 4509(20)

States are prohibited from abridging or denying the use of streets or parks for purposes of assembly, communication, and discussion of public questions.

The use of streets and public places is a part of the liberties of citizens protected by due process,[1] and states are prohibited from abridging or denying the use of streets or parks for purposes of assembly, communication, and discussion of public questions.[2] Thus, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment,[3] but actions by an owner of private property used nondiscriminatorily for private purposes only do not impose limitations on free speech.[4]

A prompt resolution by municipal officials of a request for a permit for use of a park facility for a political rally during a national political convention is a dictate of due process in protection of First Amendment rights.[5] Demonstrators who are convicted

under a statute prohibiting remaining at a place of unlawful assembly, after having been warned to disperse by a magistrate or public officer, are not deprived of due process of law.[6]

An ordinance which permits the denial of parade licenses pursuant to specific criteria, which are narrowly limited in their scope to such considerations of time, place, and manner as are necessary to the interests of public order and safety, satisfies due process when there are adequate judicial remedies available to attack unconstitutional decisions notwithstanding the absence of any provision for expeditious judicial review.[7] However, an ordinance which allowed a government administrator to vary the permit fee for assembling or parading to reflect the estimated cost of maintaining public order violated the free speech guarantees of the Fourteenth Amendment.[8]

Shopping centers.

Constitutional provisions which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited do not deny due process to the owner of the shopping center.[9] On the other hand, the free speech provisions of the First and Fourteenth Amendments, do not prevent a privately owned and operated shopping center from enforcing nondiscriminatory and nonarbitrary bans on certain forms of activity on its premises.[10]

Street performances.

Street performances are a form of expression protected by the First and Fourteenth Amendments.[11]

Footnotes

1 U.S.—Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969).

2 U.S.—Country Hills Christian Church v. Unified School Dist. No. 512, Johnson County, State of Kan., 560 F. Supp. 1207, 10 Ed. Law Rep. 1006 (D. Kan. 1983).

3 U.S.—City of Chicago v. Morales, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67, 72 A.L.R.5th 665 (1999).

4 Ohio—Cincinnati v. Thompson, 96 Ohio App. 3d 7, 643 N.E.2d 1157 (1st Dist. Hamilton County 1994).

5 U.S.—Slate v. McFetridge, 484 F.2d 1169 (7th Cir. 1973).

6 Ala.—Thomas v. City of Eufaula, 44 Ala. App. 643, 218 So. 2d 813 (1968).

7 U.S.—Progressive Labor Party v. Lloyd, 487 F. Supp. 1054 (D. Mass. 1980).

8 U.S.—Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

9 U.S.—PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980).

10 Pa.—Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co., 335 Pa. Super. 493, 485 A.2d 1 (1984), order aff'd, 512 Pa. 23, 515 A.2d 1331 (1986).

11 U.S.—Horton v. City of St. Augustine, Fla., 272 F.3d 1318 (11th Cir. 2001).

16D C.J.S. Constitutional Law § 2146

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

4. Political Rights

§ 2146. Due process issues regarding politically rights, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4230 to 4237

The due process guaranty is not violated by legislative regulation of the qualifications of candidates and voters, and the manner of conducting an election, but unreasonable and arbitrary regulations of elections may violate due process.

When burdens on voting imposed by government are severe, strict scrutiny applies under the First and Fourteenth Amendments, and regulation must be narrowly drawn to advance state interests of compelling importance.[1]

The due process guaranty is not violated by legislative regulation of the qualifications of candidates and voters, and the manner of conducting an election.[2] This is because the State has a legitimate interest in conducting orderly elections.[3] Nevertheless, unreasonable and arbitrary regulations of elections have been denounced as violative of due process.[4] A state cannot impose limitations on access to the ballot which constitute a denial of due process of law.[5] Thus, where a political party's county executive committee decided that a mayoral candidate was not eligible to run for public office, and where that person wished to be heard regarding the matter, the political party's county executive committee, as a matter of due process, was required to

allow candidate a reasonable opportunity to present his case.[6] And due process requires that a party in an action challenging a nominating petition have an opportunity to be heard at a meaningful time and in a meaningful manner.[7]

Filing fees.

So long as it is reasonable, such as to defray administrative expenses,[8] a filing fee as a precondition to a candidacy is not violative of due process,[9] but a filing fee violates due process when it is used as a revenue collecting device or when made an absolute qualification in order to get a candidate's name on the ballot.[10] Where, and only where, they are reasonable, regulations governing the certification and filing of nomination papers do not deny due process of law,[11] such as those respecting signatures[12] and the required number thereof.[13]

Administering the election.

The Due Process Clause does not offer any guaranty against mere errors in the administration of an election.[14] Particular periods set out by statute or ordinance for protesting the result of an election do not violate due process.[15] This is due to the need for finality in elections and a continuity of governance.[16] The exercise of the State's authority to regulate the size or makeup of the election ballot does not deny due process of law,[17] but if a ballot proposal is misleading, the fact that such proposal was framed by the legislature would not place it outside the strictures of due process.[18]

Vote recount.

For a state recount in a presidential election to be conducted in compliance with requirements of equal protection and due process, it requires the adoption of adequate statewide standards for determining what is a legal vote, practicable procedures to implement them, and orderly judicial review of any disputed matters that might arise.[19]

Footnotes

1 U.S.—Dudum v. Arntz, 640 F.3d 1098 (9th Cir. 2011).
2 Wis.—State v. Kohler, 200 Wis. 518, 228 N.W. 895, 69 A.L.R. 348 (1930).
3 U.S.—Hooker v. Thompson, 21 Fed. Appx. 342 (6th Cir. 2001) (Not selected for publication in the Federal Reporter).
4 Ill.—Larvenette v. Elliott, 412 Ill. 523, 107 N.E.2d 743 (1952).
5 U.S.—Kay v. Mills, 490 F. Supp. 844 (E.D. Ky. 1980).
6 Miss.—Wallace v. Election Com'n of Town of Edwards, 118 So. 3d 568 (Miss. 2013).
7 Ariz.—McClung v. Bennett, 225 Ariz. 154, 235 P.3d 1037 (2010).
8 U.S.—Phillips v. Hechler, 120 F. Supp. 2d 587 (S.D. W. Va. 2000).
9 U.S.—Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970).
10 U.S.—Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970), judgment aff'd, 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92 (1972).
11 Mass.—Sears v. Secretary of the Com., 369 Mass. 392, 341 N.E.2d 264 (1975).
12 R.I.—Malinou v. Board of Elections, 108 R.I. 20, 271 A.2d 798 (1970).
13 Fla.—Danciu v. Glisson, 302 So. 2d 131 (Fla. 1974).
14 Mo.—Moore v. City of Pacific, 534 S.W.2d 486 (Mo. Ct. App. 1976).
15 Wis.—State ex rel. Shroble v. Prusener, 185 Wis. 2d 102, 517 N.W.2d 169 (1994).

16 Wis.—State ex rel. Shroble v. Prusener, 185 Wis. 2d 102, 517 N.W.2d 169 (1994).

17 Cal.—Libertarian Party v. Eu, 83 Cal. App. 3d 470, 147 Cal. Rptr. 888 (2d Dist. 1978).

18 Mich.—West Shore Community College v. Manistee County Bd. of Com'rs, 389 Mich. 287, 205 N.W.2d 441 (1973).

19 U.S.—Bush v. Gore, 531 U.S. 98, 121 S. Ct. 525, 148 L. Ed. 2d 388 (2000).

End of Document

16D C.J.S. Constitutional Law § 2147

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

§ 2147. Due process issues regarding right to vote

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4232, 4233

The right to vote is clearly fundamental and is protected by the Due Process Clause.

The right to vote is clearly fundamental and is protected by the Due Process Clause,[1] but such protection is measured by the rules governing due process requirements generally.[2] Consequently, not every law that imposes any burden upon the right to vote must be subject to strict scrutiny; instead, the rigorousness of inquiry into the propriety of state election law depends upon the extent to which the challenged regulation burdens First and Fourteenth Amendment rights.[3] When state election law subjects First and Fourteenth Amendment rights to "severe" restriction, the regulation must be narrowly drawn to advance a state interest of compelling importance, but when state election law imposes only "reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights, the state's important regulatory interests are generally sufficient to justify restrictions.[4] If the right is denied altogether or abridged in a manner which renders the electoral process fundamentally unfair, a violation of due process may be found.[5] Minimum standards of due process demand notice and an opportunity to be heard before the right to vote may be taken away.[6]

Substantial changes to state election procedures and/or implementation of nonuniform standards run afoul of due process if they result in significant disenfranchisement and vote dilution or induce voters to miscast their votes.[7]

In attempting to prove a state infringement of the constitutionally protected right to vote, it is not enough merely to show facts related to the management of elections and then allege a violation of the Fourteenth Amendment, as the aggrieved party must go further and demonstrate how such facts caused an impairment of that right.[8]

Write-in voting.

When a state's ballot access laws pass constitutional muster as imposing only reasonable burdens on First and Fourteenth Amendment rights, a prohibition against write-in voting will be presumptively valid since any burden on the right to vote for a candidate of one's choice will be light and normally will be counterbalanced by the very state interests supporting the ballot access scheme.[9]

Purging.

A statute requiring that registration books be purged of those electors who failed to vote at a preceding general election does not deny due process.[10] At most, constitutional due process requires that upon purging a name from the book, a notification of that fact be sent to that person at the address shown on the registration book.[11]

CUMULATIVE SUPPLEMENT

Cases:

Statutory provisions governing the validation and rejection of absentee ballots during COVID-19 pandemic did not violate absentee voter's right to procedural due process; although voter had fundamental right to vote, the risk that absentee voter would be erroneously deprived of that right was substantially reduced by Secretary of State's procedures for notification and opportunity to cure defective ballots, and State's interest in following statutory directives governing the election was substantial. U.S. Const. Amend. 14; Me. Const. art. 1, § 6A; 21-A Me. Rev. Stat. §§ 673, 753-A(3)-(6), 759(3)(A)-(B), 759(3)(E). Alliance for Retired Americans v. Secretary of State, 2020 ME 123, 240 A.3d 45 (Me. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981), decision aff'd, 657 F.2d 691 (5th Cir. 1981).

2 U.S.—Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982).

3 U.S.—Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

4 U.S.—Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

5 U.S.—Rudisill v. Flynn, 470 F. Supp. 1269 (N.D. Ill. 1979), judgment aff'd, 619 F.2d 692 (7th Cir. 1980).

6 Conn.—Sweeney v. Burns, 34 Conn. Supp. 94, 377 A.2d 338 (C.P. 1977).

7 U.S.—Northeast Ohio Coalition for Homeless v. Husted, 696 F.3d 580, 104 A.L.R.6th 717 (6th Cir. 2012).

8 U.S.—Harris v. Conradi, 675 F.2d 1212 (11th Cir. 1982).

9 U.S.—Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992).

10 Colo.—Duprey v. Anderson, 184 Colo. 70, 518 P.2d 807 (1974).

11 Colo.—Duprey v. Anderson, 184 Colo. 70, 518 P.2d 807 (1974).

End of Document

16D C.J.S. Constitutional Law § 2148

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

4. Political Rights

§ 2148. Due process issues regarding new political parties

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4230 to 4237

Citizens have a constitutional right, derived from the First and Fourteenth Amendments, to create and develop new political parties.

A basic constitutional right regarding elections guaranteed by the First and Fourteenth Amendments is the right of individuals to associate for the advancement of political beliefs.[1] Thus, citizens have a constitutional right, derived from the First and Fourteenth Amendments, to create and develop new political parties.[2] To the degree that a state would thwart the interest of like-minded voters to gather in pursuit of common political ends by limiting access of new parties to the ballot, there must be a corresponding interest sufficiently weighty to justify the limitation,[3] that is, a compelling state interest.[4] If state election law burdens rights of political parties and their members under the First and Fourteenth Amendments, it can survive constitutional scrutiny only if the state shows that it advances compelling state interest and is narrowly tailored to serve that interest.[5]

An election law provision assigning official status only to parties whose gubernatorial candidates received 50,000 votes in the last election does not violate the First or Fourteenth Amendment rights of independent party candidates; the requirements for official party status do not unconstitutionally limit smaller parties' access to the ballot.[6]

Footnotes

1 U.S.—Libertarian Party of Oklahoma v. Oklahoma State Election Bd., 593 F. Supp. 118 (W.D. Okla. 1984).

2 U.S.—Norman v. Reed, 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

3 U.S.—Norman v. Reed, 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

4 U.S.—Libertarian Party of Oklahoma v. Oklahoma State Election Bd., 593 F. Supp. 118 (W.D. Okla. 1984).

5 U.S.—Miller v. Brown, 503 F.3d 360 (4th Cir. 2007).

6 U.S.—Person v. New York State Bd of Elections, 467 F.3d 141 (2d Cir. 2006).

End of Document

16D C.J.S. Constitutional Law § 2149

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

E. Personal and Political Rights

4. Political Rights

§ 2149. Due process issues regarding political ballot access

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4230 to 4237

Restrictions on ballot access by candidates implicate fundamental rights protected by the First Amendment as applied to the states through the Fourteenth Amendment.

In ballot access cases, the inquiry is whether the challenged restriction unfairly or unnecessarily burdens the availability of political opportunity.[1] Filing deadline and petition signature requirements for independent candidates are ballot access restrictions which could limit the field of candidates from which voters may choose and those restrictions implicate fundamental rights protected by the First Amendment, as applied to the states through the Fourteenth Amendment, by burdening fundamental rights of individuals to associate for the advancement of political beliefs and burdening the right of qualified voters to cast their votes effectively.[2] Consequently, a statute that effectively requires new a political party to gain more signatures on ballot petitions in a multidistrict subdivision of the state than are required to obtain a place on the statewide ballot violates the First and Fourteenth Amendment rights of members of the new party.[3]

In determining whether a state's petition-signature requirement for ballot access violates political parties' constitutional rights, a court cannot apply a litmus test but instead must evaluate the character and magnitude of the asserted injury, identify the

interests advanced by the state, and evaluate the legitimacy and strength of each asserted state interest and determine the extent to which those interests necessitates the burdening of the parties' rights.[4] When a state ballot access law provision imposes only reasonable, nondiscriminatory restrictions upon the plaintiffs' First and Fourteenth Amendment rights, a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.[5]

CUMULATIVE SUPPLEMENT

Cases:

Election regulations that make it virtually impossible for minor political parties to qualify for the ballot impose severe burdens on First and Fourteenth Amendment rights, warranting strict scrutiny review. U.S. Const. Amends. 1, 14. SAM Party of New York v. Kosinski, 987 F.3d 267 (2d Cir. 2021).

Inquiry into whether county-based signature-gathering requirements for political party's nominees to appear on ballot comport with First and Fourteenth Amendments is fact intensive, and requires on-the-record analysis of facts pertaining to particular restriction under scrutiny, including number of counties in state at issue, distribution of voters throughout those counties, and any other indications of magnitude of vote dilution that will take place under challenged restriction. U.S. Const. Amends. 1, 14. Constitution Party of Pennsylvania v. Cortes, 877 F.3d 480 (3d Cir. 2017).

The *Anderson-Burdick* framework governs First and Fourteenth Amendment challenges to ballot-access restrictions. U.S. Const. Amends. 1, 14. Kishore v. Whitmer, 972 F.3d 745 (6th Cir. 2020).

Under less exacting scrutiny, Arizona's primary ballot signature requirements, setting the threshold as a percentage of qualified signers for established political party, were not inherently or invidiously more burdensome than those imposed on new political party, and thus primary ballot access scheme was neither discriminatory nor unreasonable, and did not violate equal protection; policy afforded significant benefits to all established parties and furthered the state's interests in avoiding voter confusion, minimizing clutter on the primary and general ballots, and eliminating frivolous candidacies. U.S. Const. Amend. 14; Ariz. Rev. Stat. Ann. § 16-322(A)(1). Arizona Libertarian Party v. Hobbs, 925 F.3d 1085 (9th Cir. 2019).

District court's determination that state's criminal statute, prohibiting third parties from collecting early ballots from voters, served state's important regulatory interests was not clearly erroneous, for purposes of *Anderson-Burdick* balancing test for a challenge to a state election law under the First and Fourteenth Amendments; state had facially important interest in a prophylactic measure intended to prevent absentee voter fraud and to maintain public confidence, and state could reasonably conclude that the statute reduced opportunities for loss or destruction of early ballots by limiting possession of early ballots to presumptively trustworthy proxies, and also lessened the potential for pressure or intimidation of voters, and other forms of voter fraud and abuse. U.S. Const. Amends. 1, 14; Ariz. Rev. Stat. Ann. §§ 16-542(D), 16-1005(H, I). Democratic National Committee v. Reagan, 904 F.3d 686 (9th Cir. 2018).

To determine whether a ballot-access regulation governing the mechanics of the electoral process violates the United States Constitution, a court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate, and then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule; the court must both determine the legitimacy and strength of each of those interests and consider the extent to which those interests make it necessary to burden the plaintiff's rights. U.S. Const. Amends. 1, 14. Jones v. Secretary of State, 2020 ME 113, 238 A.3d 982 (Me. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983).

2 U.S.—Stoddard v. Quinn, 593 F. Supp. 300 (D. Me. 1984).

3 U.S.—Norman v. Reed, 502 U.S. 279, 112 S. Ct. 698, 116 L. Ed. 2d 711 (1992).

4 U.S.—Green Party of Georgia v. Georgia, 551 Fed. Appx. 982 (11th Cir. 2014).

5 Conn.—Butts v. Bysiewicz, 298 Conn. 665, 5 A.3d 932 (2010).

16D C.J.S. Constitutional Law VIII XXII F Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Addicts and Addiction
A.L.R. Index, Aliens
A.L.R. Index, Due Process
A.L.R. Index, Fourteenth Amendment
A.L.R. Index, Incompetent or Insane Persons
A.L.R. Index, Indians
A.L.R. Index, Juvenile Courts and Delinquent Children
A.L.R. Index, Landlord and Tenant
A.L.R. Index, Mental Disability
A.L.R. Index, Sexual Offender Registration
West's A.L.R. Digest, Constitutional Law 2820 to 2822, 3921, 4080 to 4083, 4102, 4112, 4335 to 4348, 4401, 4435 to 4441, 4464 to 4469, 4784, 4785, 4809

End of Document

16D C.J.S. Constitutional Law § 2150

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2150. Due process issues regarding alien status and aliens, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3921, 4435 to 4441

Due process rights are applicable to aliens present in the United States and its territories, whether legally or illegally.

Fifth and Fourteenth Amendment protections against deprivations of life, liberty, or property without due process of law are applicable to aliens[1] who are either lawful residents,[2] have developed a substantial connection with the United States,[3] or whose presence in this country[4] or in territories subject to its jurisdiction[5] is unlawful, involuntary, or transitory.[6] The Due Process Clauses of the Fifth and Fourteenth Amendments protect every person within the nation's borders from deprivation of life, liberty, or property without due process of law; even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.[7] However, foreign entities or nationals without minimum contacts with the United States lack due process and other constitutional rights.[8]

Aliens are also entitled, under the Fifth Amendment, to receive a judicial evaluation of a claim to United States citizenship.[9] Thus, constitutional due process guaranties the alien access to domestic courts[10] and to procedural due process in litigation in the United States.[11] In fact, prior to a final deportation order, deportable aliens possess greater procedural due process rights than

do excludable aliens.[12] Accordingly, due process protections are applicable to aliens in deportation proceedings[13] and criminal proceedings within the territory of the United States,[14] whether at the border or in the interior of the country.[15] However, aliens are not necessarily entitled to the full range of due process protections afforded to criminal defendants; rather, the procedural safeguards are minimal because aliens do not have a constitutional right to enter or remain in the United States.[16]

The applicability of due process protections to aliens does not entitle them to enjoy all the advantages of citizenship or to be placed in one homogeneous legal classification,[17] and they may be denied the rights to vote,[18] to hold public office,[19] to serve on juries,[20] or to be employed by the federal civil service.[21]

Ownership of property.

Although due process protections are applicable to alien ownership of property in the United States,[22] federal control of alien property in times of peace,[23] and state restrictions on the distribution of decedent estates to nonresident aliens,[24] have withstood challenges on due process grounds. Discriminations on the basis of alienage have also been validated, for example, in such matters as acquisitions of real property,[25] priorities accorded to local over foreign creditors,[26] and eligibility for farm operating loans.[27]

Discrimination.

In order to comply with due process, discrimination on the basis of alienage must be justifiable by a legitimate and substantial governmental interest.[28] Allegations of due process violations as a result of state discrimination on the basis of alienage are subject to stricter judicial scrutiny than similar allegations based on federal discrimination on the basis of alienage[29] inasmuch as Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the states.[30]

Enemy combatants.

Alien detainees held as "enemy combatants" at the United States naval base at Guantanamo Bay, Cuba, have fundamental due process rights, and the process provided by statute for review of the detainees' status did not provide an adequate substitute for habeas corpus, given the lack of opportunity for the detainees to present relevant exculpatory evidence not made part of the record in earlier proceedings.[31] On the other hand, due process is not applicable to enemy aliens outside United States territory.[32]

CUMULATIVE SUPPLEMENT

Cases:

United States citizen did not have fundamental right to reside in United States with his non-citizen relatives, and thus United States Citizenship and Immigration Services (USCIS) did not violate his substantive due process rights by denying his petitions for legal permanent residence (LPR) status for his non-citizen wife and her three non-citizen children pursuant to Adam Walsh Child Protection and Safety Act provision requiring that individuals convicted of covered offenses demonstrate that they pose "no risk" to beneficiaries of their LPR petitions. U.S. Const. Amend. 5; Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(a)(1)(A)(viii)(I). Gebhardt v. Nielsen, 879 F.3d 980 (9th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); Hammad v. Holder, 603 F.3d 536 (9th Cir. 2010); Ferry v. Gonzales, 457 F.3d 1117 (10th Cir. 2006) (in removal proceedings).
Kan.—State v. Muriithi, 273 Kan. 952, 46 P.3d 1145 (2002).

2 U.S.—Hellenic Lines Ltd.v.Rhoditis, 398 U.S. 306, 90 S. Ct. 1731, 26 L. Ed. 2d 252 (1970); Kiev v. Glickman, 991 F. Supp. 1090 (D. Minn. 1998).

3 U.S.—U.S. v. Verdugo-Urquidez, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990).

4 U.S.—Pugh v. Socialist People's Libyan Arab Jamahiriya, 290 F. Supp. 2d 54 (D.D.C. 2003) (Not selected for publication in the Federal Reporter).

5 U.S.—Arias v. Examining Bd. of Refrigeration and Air Conditioning Technicians, 353 F. Supp. 857 (D.P.R. 1972).

6 U.S.—Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); Borrero v. Aljets, 325 F.3d 1003 (8th Cir. 2003); U.S. v. Yian, 905 F. Supp. 160 (S.D. N.Y. 1995), aff'd, 134 F.3d 79 (2d Cir. 1998).

7 U.S.—Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014).

8 U.S.—United States v. All Assets Held In Account Number 80020796, 2015 WL 1285791 (D.D.C. 2015).

9 U.S.—Rivera v. Ashcroft, 394 F.3d 1129 (9th Cir. 2005).

10 U.S.—Times Newspapers Ltd. (Of Great Britain) v. McDonnell Douglas Corp., 387 F. Supp. 189, 19 Fed. R. Serv. 2d 714 (C.D. Cal. 1974).

11 U.S.—Somakoko v. Gonzales, 399 F.3d 882 (8th Cir. 2005).

12 U.S.—Sengchanh v. Lanier, 89 F. Supp. 2d 1356 (N.D. Ga. 2000).

13 U.S.—Ovalles v. Holder, 577 F.3d 288 (5th Cir. 2009); Ibrahim v. Gonzales, 434 F.3d 1074 (8th Cir. 2006).

14 U.S.—Wong Wing v. U.S., 163 U.S. 228, 16 S. Ct. 977, 41 L. Ed. 140 (1896).
Mass.—Com. v. Al Saud, 459 Mass. 221, 945 N.E.2d 272 (2011).

15 U.S.—U.S. v. Henry, 604 F.2d 908 (5th Cir. 1979).

16 U.S.—Brue v. Gonzales, 464 F.3d 1227 (10th Cir. 2006).

17 U.S.—Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

18 Cal.—People v. Rodriguez, 35 Cal. App. 3d 900, 111 Cal. Rptr. 238 (2d Dist. 1973).

19 Tex.—Pintor v. Martinez, 202 S.W.2d 333 (Tex. Civ. App. Austin 1947), writ refused n.r.e.

20 U.S.—U.S. v. Avalos, 541 F.2d 1100 (5th Cir. 1976).
Due process as applied to composition of juries in criminal proceedings, generally, see § 1712.

21 U.S.—Jalil v. Campbell, 590 F.2d 1120 (D.C. Cir. 1978).
As to the due process guaranty applicable to public employment of aliens, see § 2155.

22 U.S.—U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

23 U.S.—Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966).

24 Cal.—Estate of Horman, 5 Cal. 3d 62, 95 Cal. Rptr. 433, 485 P.2d 785 (1971).

25 U.S.—Frick v. Webb, 263 U.S. 326, 44 S. Ct. 115, 68 L. Ed. 323 (1923).

26 U.S.—U.S. v. Pink, 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942).

27 U.S.—Lopez v. Bergland, 448 F. Supp. 1279 (N.D. Cal. 1978).

28 U.S.—Lopez v. Bergland, 448 F. Supp. 1279 (N.D. Cal. 1978).

29 U.S.—Lopez v. Bergland, 448 F. Supp. 1279 (N.D. Cal. 1978).

30 U.S.—Mathews v. Diaz, 426 U.S. 67, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976).

31 U.S.—Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008).

32 U.S.—Nash on Behalf of Takeshi Hashimoto v. MacArthur, 184 F.2d 606 (D.C. Cir. 1950).

End of Document

16D C.J.S. Constitutional Law § 2151

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2151. Due process issues regarding admission of, and asylum for, aliens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4438, 4440

The executive branch of the government must, as a general rule, respect procedural safeguards of due process in the enforcement of policies pertaining to the entry of aliens and their right to remain in the United States.

Pursuant to the general right of aliens to the protection of the Due Process Clause, the executive branch of the government must respect procedural safeguards of due process in the enforcement of policies pertaining to the entry of aliens and their right to remain in the United States.[1]

Nonadmitted aliens who seek entry at the border are entitled only to whatever process Congress provides.[2] Under well-established Supreme Court precedents, excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole.[3]

The principles of due process and fundamental fairness require immigration officials to advise aliens of their right to apply for asylum before requesting them to depart voluntarily.[4] The Due Process Clause of the Fifth Amendment entitles an asylum applicant to a fair hearing, which includes the opportunity to be heard at a meaningful time and in a meaningful manner.[5] To

succeed on a due process claim in asylum proceedings, an alien must establish two closely linked elements: (1) that a defect in the proceeding rendered it fundamentally unfair, and (2) that the defect prejudiced the case's outcome.[6] Denial of alien's request for a continuance in an asylum proceeding is not a violation of the alien's due process rights where the alien failed to make a sufficient showing that the alleged violation affected the outcome of the proceeding.[7]

CUMULATIVE SUPPLEMENT

Cases:

Alien was deprived of her due process rights, in proceedings on her claim for asylum, withholding of removal, or relief under the Convention Against Torture (CAT), by Immigration Judge's (IJ) failure to consider her testimony on remand, in direct conflict with the instructions of the Board of Immigration Appeals (BIA); although the IJ explained that his denial of alien's asylum claim turned on the various inconsistencies in her application, he improperly failed to give her an opportunity to testify, and to consider the relevance of that testimony. U.S. Const. Amend. 5. Atemnkeng v. Barr, 948 F.3d 231 (4th Cir. 2020).

Mexican alien lacked any protected liberty interest in the discretionary grant of his motion to reopen removal proceedings, and thus, the denial of that motion did not implicate due process. U.S. Const. Amend. 5; 8 C.F.R. § 1003.23(b)(1)(iv). Mendias-Mendoza v. Sessions, 877 F.3d 223 (5th Cir. 2017).

Immigration judge (IJ) did not demonstrate bias against Mexican alien seeking asylum, withholding of removal, and relief under the Convention Against Torture (CAT), as could support alien's due process claim, by asking most of the questions at the administrative hearing and by saying he was going to treat the case as a withholding of removal only case. U.S. Const. Amend. 5; Immigration and Nationality Act §§ 101, 208, 8 U.S.C.A. §§ 1101(a)(42)(A), 1158(a)(2)(B); 8 C.F.R. § 1208.16. Plaza-Ramirez v. Sessions, 908 F.3d 282 (7th Cir. 2018).

Alien suffered injury in fact when he was denied opportunity to apply for asylum on basis that he was subject to reinstated order for his removal, and thus had standing to challenge statute preventing him from applying for asylum on that basis, even though asylum was form of discretionary relief, overruling *Delgado–Arteaga v. Sessions*, 856 F.3d 1109. Immigration and Nationality Act §§ 208, 241, 8 U.S.C.A. §§ 1158(a), 1231(a)(5); 8 C.F.R. § 208.31(e). Garcia v. Sessions, 873 F.3d 553 (7th Cir. 2017).

Alien failed to establish that he suffered an injury-in-fact in being placed in expedited removal proceedings, as required to have standing to challenge statute governing those proceedings, and thus Court of Appeals lacked jurisdiction to review argument that he should have been permitted to apply for asylum because that regulation, under which he was placed in withholding-only removal proceedings, was ultra vires; since alien was seeking the discretionary relief of asylum, no liberty interest was at stake within meaning of the Due Process Clause. U.S. Const. Amend. 5; Immigration and Nationality Act § 208, 8 U.S.C.A. § 1158(a)(1); 8 C.F.R. § 1208.31(g)(2)(i). Delgado-Arteaga v. Sessions, 856 F.3d 1109 (7th Cir. 2017).

Mexican alien failed to demonstrate immigration judge (IJ) violated his procedural due process rights when he denied the alien's purported off-the-record request for a closed asylum hearing, absent any evidence establishing that alien made such a request. U.S. Const. Amend. 5. Barragan-Ojeda v. Sessions, 853 F.3d 374 (7th Cir. 2017).

Asylum officer's provision of a Spanish-language interpreter rather than an interpreter in native language, Chuj, for a previously removed alien who had re-entered the United States illegally, and who sought withholding of reinstated removal based on fear of persecution or torture if returned to his native Guatemala, did not deprive alien of due process rights and a fair hearing; alien indicated that he understood a lot of Spanish, consented to proceeding in Spanish, said he did not have any problems understanding interpreter and that asylum officer's summary of alien's testimony was correct, did not request to add anything, did not specifically indicate what evidence he was unable to present, and was not prevented from providing evidence that

established that he feared returning to Guatemala. U.S. Const. Amend. 14; Immigration and Nationality Act § 241, 8 U.S.C.A. § 1231(b)(3). Bartolome v. Sessions, 904 F.3d 803 (9th Cir. 2018).

Fact that legal-aid providers did not answer alien's calls did not establish a due process violation by the government in proceeding on applications for asylum and withholding of removal. U.S. Const. Amend. 5. Matumona v. Barr, 945 F.3d 1294 (10th Cir. 2019).

Alien failed to establish that immigration judge (IJ) displayed lack of reasoned consideration before denying asylum applications brought by alien and her daughter, notwithstanding alien's claim that the IJ failed to read alien's prehearing briefing or review the evidence in the record; IJ stated that he considered all documents that had been filed in alien's case, including alien's brief in support of her application, IJ announced at beginning of hearing that he was familiar with prehearing brief and would read it, and IJ's frequent clarifying questions did not indicate a failure to review materials submitted, but rather showed that he wished to make sure he understood the record correctly. Immigration and Nationality Act § 240, 8 U.S.C.A. § 1229a(b)(1). Castillo Munoz v. U.S. Attorney General, 786 Fed. Appx. 988 (11th Cir. 2019).

Board of Immigration Appeals (BIA) afforded alien, a native and citizen of Cameroon, due process at hearing on his application for asylum; alien received notice and opportunity for hearing, and BIA considered the evidence presented by alien. U.S. Const. Amend. 5; Immigration and Nationality Act § 208, 8 U.S.C.A. § 1158. Sama v. U.S. Attorney General, 887 F.3d 1225 (11th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

2 U.S.—U.S. v. Sanchez-Aguilar, 719 F.3d 1108 (9th Cir. 2013), cert. denied, 134 S. Ct. 364, 187 L. Ed. 2d 252 (2013).

3 U.S.—Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984), judgment aff'd, 472 U.S. 846, 105 S. Ct. 2992, 86 L. Ed. 2d 664 (1985).

4 U.S.—Orantes-Hernandez v. Smith, 541 F. Supp. 351, 11 Fed. R. Evid. Serv. 98 (C.D. Cal. 1982).

5 U.S.—Omondi v. Holder, 674 F.3d 793 (8th Cir. 2012).

6 U.S.—Tiscareno-Garcia v. Holder, 780 F.3d 205 (4th Cir. 2015).

7 U.S.—Brushtulli v. Holder, 594 Fed. Appx. 282 (6th Cir. 2014).

16D C.J.S. Constitutional Law § 2152

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2152. Due process issues regarding exclusion or deportation of aliens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4438

A deportation proceeding generally must conform to procedural due process requirements, i.e., traditional due process standards of fairness, but due process does not require the government to employ the least burdensome means to accomplish its goal.

Fifth Amendment due process requirements are applicable to the deportation[1] and exclusion[2] of aliens, including aliens returning from a brief trip abroad,[3] although such due process requirements have been found to be inapplicable to the readmission of resident aliens returning to the United States after an extended absence.[4]

A proceeding for the deportation of an alien generally must conform to procedural due process requirements,[5] i.e., traditional due process standards of fairness,[6] but when the government deals with deportable aliens, due process does not require it to employ the least burdensome means to accomplish its goal.[7] Even so, an alien subject to deportation must be accorded a full and fair hearing[8] consistent with due process.[9] Accordingly, the deportee must receive timely notice and the opportunity to be heard,[10] and the right to cross-examine witnesses[11] and to produce evidence,[12] and the decision in the matter must be based on

substantial evidence produced at the hearing.[13] The denial of the opportunity to present opening statements or closing arguments at a deportation proceeding may also constitute a due process violation.[14] However, deportations are not criminal proceedings and the full trappings of procedural protections that are accorded criminal defendants are not necessarily required for deportation proceedings,[15] and lack of notice and opportunity to be heard does not necessarily constitute violation of due process, especially where there is no injury to the alien involved.[16]

While a violation by the government of rules or regulations governing deportation may constitute a denial of due process with respect to the deportee,[17] it must be shown, in order to establish a denial of due process in a deportation proceeding, that the deportee has been prejudiced by a particular deficiency,[18] as the mere existence of an error in the proceedings does not by itself establish a want of due process.[19] Prejudice is found where the defects in the proceedings may well have resulted in a deportation that would not otherwise have occurred.[20]

The combination of hearing and investigating functions in one officer in deportation proceedings is not a denial of due process[21] in the absence of a showing that such officer is disqualified by personal bias or prejudice.[22] On the other hand, the failure of the Board of Immigration Appeals to exercise its own discretion in determining whether an application for suspension of deportation should be granted is a denial of due process.[23]

Detention during deportation proceedings.

Detention during deportation proceedings is a constitutionally valid aspect of the deportation process,[24] and the prolonged detention of an illegal alien is not violative of due process where a substantial portion of the delay is attributable to the alien's litigation strategy and where the evidence indicates that the alien, if released, would pose a substantial risk of flight.[25] Furthermore, there is no due process impediment to the indefinite detention, under a final order of exclusion, deportation, or removal, of an alien with a criminal record if there is a possibility of the alien's eventual departure; there are adequate and reasonable provisions for a grant of parole, and detention is necessary to prevent a threat to the community.[26] The government also may not violate an excludable alien's due process rights if it continues to detain the alien pending deportation even if the government offers no reason for the alien's continued detention.[27] Nevertheless generally, the imprisonment for an indefinite time period of excludable or deportable aliens is a deprivation of liberty in violation of the Fifth Amendment.[28] With respect to juvenile aliens who are detained on suspicion of being deportable, a regulation permitting them to be released only to their parents, close relatives, or legal guardians does not violate substantive due process.[29]

Bail.

The exercise of discretion by the Attorney General with respect to granting bail to aliens in deportation cases does not violate the Due Process Clause of the Constitution,[30] and holding aliens in deportation cases without bail does not deny due process where there is a reasonable apprehension that they constitute a threat to national security.[31]

Appeals.

Aliens are not constitutionally entitled to administrative appeals.[32] Moreover, where an alien determined to be deportable never requested an extension of time to file a brief on appeal of the deportation order, and where the application for notice of appeal fairly set out the time requirement for appeal, the alien's due process rights are not violated by the denial of the appeal as untimely.[33]

CUMULATIVE SUPPLEMENT

Cases:

While aliens who have established connections in the United States have due process rights in deportation proceedings, Congress is entitled to set the conditions for an alien's lawful entry into the United States, and as a result, an alien at the threshold of initial entry cannot claim any greater rights under the Due Process Clause. U.S. Const. Amend. 5. Department of Homeland Security v. Thuraissigiam, 140 S. Ct. 1959 (2020).

United States Citizenship and Immigration Services (USCIS) did not violate United States citizen's procedural due process rights when it denied his petitions for legal permanent residence (LPR) status for his non-citizen wife and her three non-citizen children pursuant to Adam Walsh Child Protection and Safety Act provision requiring that individuals convicted of covered offenses demonstrate that they pose "no risk" to beneficiaries of their LPR petitions, where USCIS gave citizen notice of its intent to revoke his petitions and invited him to submit evidence showing that he posed "no risk," reviewed 33 documents that he submitted for review, and revoked its earlier approval of his petitions in well-reasoned, five-page decision. U.S. Const. Amend. 5; Immigration and Nationality Act § 204, 8 U.S.C.A. § 1154(a)(1)(A)(viii)(I). Gebhardt v. Nielsen, 879 F.3d 980 (9th Cir. 2018).

Alien's waiver of right to seek judicial review of his removal order was not considered and intelligent, in violation of due process, even though notice of intent to issue final administrative removal order described window in which alien could respond to charges against him or file petition for judicial review, where notice did not explicitly inform him that he could refute, through either administrative or judicial procedure, legal conclusion underlying his removability, alien was not represented and never had benefit of appearing before immigration judge, despite alien's request for hearing, and there was no evidence that immigration officer ever met with alien to explain form or issues it raised. U.S. Const. Amend. 5; Immigration and Nationality Act § 276, 8 U.S.C.A. § 1326(d). United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017).

Alleged alien's conviction for possession with intent to distribute less than 50 kilograms of marijuana in violation of the Comprehensive Drug Abuse Prevention and Control Act, resulting in a sentence exceeding one year, the judgment for which did not list the misdemeanor sentencing exception, constituted an aggravated felony under the Immigration and Nationality Act (INA), such that his subsequent deportation was valid and did not violate his due process rights. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C.A. § 1227(a)(2)(A)(iii); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), (b)(1)(D), 21 U.S.C.A. § 841(a), (b)(1)(D). U.S. v. Gonzalez-Corn, 807 F.3d 989 (9th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003); U.S. ex rel. Tisi v. Tod, 264 U.S. 131, 44 S. Ct. 260, 68 L. Ed. 590 (1924).

2 U.S.—Leng May Ma v. Barber, 357 U.S. 185, 78 S. Ct. 1072, 2 L. Ed. 2d 1246 (1958).

3 U.S.—Rosenberg v. Fleuti, 374 U.S. 449, 83 S. Ct. 1804, 10 L. Ed. 2d 1000 (1963).

4 U.S.—Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953).

5 U.S.—Navia-Duran v. Immigration and Naturalization Service, 568 F.2d 803 (1st Cir. 1977).

6 U.S.—Cuevas-Ortega v. Immigration and Naturalization Service, 588 F.2d 1274 (9th Cir. 1979).

7 U.S.—Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).

8 U.S.—Gilaj v. Gonzales, 408 F.3d 275, 2005 FED App. 0208P (6th Cir. 2005).

9 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).
10 U.S.—Qing Hua Lin v. Holder, 736 F.3d 343 (4th Cir. 2013).
11 U.S.—Torres de Figueroa v. Holder, 365 Fed. Appx. 889 (9th Cir. 2010).
12 U.S.—Ibarra-Flores v. Gonzales, 439 F.3d 614 (9th Cir. 2006).
13 U.S.—U.S. v. Gasca-Kraft, 522 F.2d 149 (9th Cir. 1975).
14 U.S.—Gilaj v. Gonzales, 408 F.3d 275, 2005 FED App. 0208P (6th Cir. 2005).
15 U.S.—Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
16 U.S.—Mohomed v. Vician, 490 F. Supp. 954, 54 A.L.R. Fed. 924 (S.D. N.Y. 1980).
17 U.S.—Navia-Duran v. Immigration and Naturalization Service, 568 F.2d 803 (1st Cir. 1977).
18 U.S.—Gilaj v. Gonzales, 408 F.3d 275, 2005 FED App. 0208P (6th Cir. 2005).
19 U.S.—U.S. ex rel. Vajtauer v. Commissioner of Immigration at Port of New York, 273 U.S. 103, 47 S. Ct. 302, 71 L. Ed. 560 (1927).
20 U.S.—Eta-Ndu v. Gonzales, 411 F.3d 977 (8th Cir. 2005).
21 U.S.—Marcello v. Bonds, 349 U.S. 302, 75 S. Ct. 757, 99 L. Ed. 1107 (1955).
22 U.S.—U.S. ex rel. Dolenz v. Shaughnessy, 200 F.2d 288 (2d Cir. 1952).
23 U.S.—United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954).
24 U.S.—Demore v. Kim, 538 U.S. 510, 123 S. Ct. 1708, 155 L. Ed. 2d 724, 187 A.L.R. Fed. 633 (2003).
25 U.S.—Doherty v. Thornburgh, 750 F. Supp. 131 (S.D. N.Y. 1990), judgment aff'd, 943 F.2d 204 (2d Cir. 1991).
26 U.S.—Oyedeji v. Ashcroft, 332 F. Supp. 2d 747 (M.D. Pa. 2004).
27 U.S.—In re Cuban, 822 F. Supp. 192 (M.D. Pa. 1993).
28 U.S.—Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).
29 U.S.—Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).
30 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).
31 U.S.—Carlson v. Landon, 342 U.S. 524, 72 S. Ct. 525, 96 L. Ed. 547 (1952).
32 U.S.—Guentchev v. I.N.S., 77 F.3d 1036, 33 Fed. R. Serv. 3d 1124 (7th Cir. 1996).
33 U.S.—Sadegh-Nobari v. Immigration and Naturalization Service, 676 F.2d 1348 (10th Cir. 1982).

End of Document

16D C.J.S. Constitutional Law § 2153

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2153. Due process issues regarding exclusion or deportation of aliens—Right to counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4438

An alien being deported has a statutory privilege to be represented by counsel at no cost to the government, and in certain circumstances, depriving an alien of the statutory right to counsel may rise to the level of a due process violation.

There is no constitutional right to counsel in deportation proceedings, but due process must be accorded under the Fifth Amendment.[1] An alien being deported has a statutory "privilege" to be represented by counsel at no cost to the government,[2] and in certain circumstances, depriving an alien of the statutory right to counsel may rise to the level of a due process violation.[3] Ineffective assistance of counsel in a deportation hearing results in a denial of due process under the Fifth Amendment only when the proceeding is so fundamentally unfair that the alien is prevented from reasonably presenting a case.[4]

While it has been declared that aliens are not denied due process by the lack of representation by counsel unless they are prejudiced thereby,[5] there is also authority to the effect that the statutory right granted to aliens to be represented by counsel of their choice in deportation proceedings is too important and fundamental to be circumscribed by the harmless error rule.[6]

CUMULATIVE SUPPLEMENT

Cases:

A claim that counsel's ineffectiveness in immigration proceedings violated due process requires a showing of inadequate performance and prejudice. U.S. Const. Amend. 5. Guan v. Barr, 925 F.3d 1022 (9th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—U.S. v. Lopez-Chavez, 757 F.3d 1033 (9th Cir. 2014).

2 8 U.S.C.A. §§ 1229a(b)(4)(A), 1362.

3 U.S.—Njoroge v. Holder, 753 F.3d 809 (8th Cir. 2014).

4 U.S.—Chuen Piu Kwong v. Holder, 671 F.3d 872 (9th Cir. 2011), cert. denied, 133 S. Ct. 2885, 186 L. Ed. 2d 933 (2013).
Representation by nonattorney
Due process is not violated by a regulation which authorizes the granting or denial of permission to an individual, who is not an attorney, to represent an alien.
U.S.—Ramirez v. Immigration and Naturalization Service, 550 F.2d 560 (9th Cir. 1977).

5 U.S.—Aguilera-Enriquez v. Immigration and Naturalization Service, 516 F.2d 565 (6th Cir. 1975).

6 U.S.—Castaneda-Delgado v. Immigration and Naturalization Service, 525 F.2d 1295 (7th Cir. 1975).

16D C.J.S. Constitutional Law § 2154

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2154. Due process issues regarding citizenship and naturalization of aliens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4441

The congressional power over the naturalization of aliens is not limited by substantive due process, but in its enforcement of certain policies, the government must respect the procedural safeguards of due process.

The congressional power over the naturalization of aliens[1] is not limited by the concept of substantive due process, but in its enforcement of congressional policies, the executive branch of the government must respect the procedural safeguards of due process.[2]

Although the Fifth Amendment entitles aliens to the opportunity to be heard at a meaningful time and in a meaningful manner, it does not violate due process for Congress to impose a reasonable limitations period upon the filing of naturalization petitions.[3] Notwithstanding the applicability of due process rights to resident aliens, they remain vulnerable to expulsion even after a long residence.[4] Moreover, the burden is on alien applicant to show eligibility for citizenship in every respect.[5]

CUMULATIVE SUPPLEMENT

Cases:

Immigration and Naturalization Service (INS) was not deliberately indifferent to whether foreign-born child's adoptive mother's application for derivative citizenship was processed, and thus did not violate mother's due process rights, where INS scheduled two interviews to complete naturalization process before child reached age 18, but they failed to attend either interview. U.S. Const. Amend. 5. Dent v. Sessions, 900 F.3d 1075 (9th Cir. 2018).

Officials' decision not to expedite naturalization ceremony of alien's mother did not show deliberate indifference to whether alien's application for derivative citizenship was processed, and thus officials did not violate alien's procedural due process rights, even though some officials directly in charge of mother's application were plausibly aware of risk posed to alien by failing to expedite mother's naturalization ceremony, where alien failed to show either that those officials possessed authority to expedite ceremonies or that anyone who did have such authority had been made aware of his situation. U.S. Const. Amend. 5. Brown v. Lynch, 831 F.3d 1146 (9th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S. Const. Art. I, § 8.

2 U.S.—Galvan v. Press, 347 U.S. 522, 74 S. Ct. 737, 98 L. Ed. 911 (1954).

3 U.S.—Sukwanputra v. Gonzales, 434 F.3d 627 (3d Cir. 2006).

4 U.S.—Bassett v. U.S. Immigration and Naturalization Service, 581 F.2d 1385 (10th Cir. 1978).

5 U.S.—I.N.S. v. Pangilinan, 486 U.S. 875, 108 S. Ct. 2210, 100 L. Ed. 2d 882 (1988).

16D C.J.S. Constitutional Law § 2155

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

1. Aliens

§ 2155. Due process issues pertaining to employment of aliens

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3921, 4435, 4437

Due process protection extends generally to determinations affecting aliens' right to work in the United States.

Due process protection extends generally to determinations affecting aliens' right to work in the United States,[1] and it is improper to interfere without due process of law with alien employees' right to work.[2] Nevertheless, workers will lack standing to join in an employer's claim that they have been denied the right to work without due process where they have been suspended by the employer not by the federal government.[3] Furthermore, depriving an alien of the ability to work legally in the United States after labor certification but before the issuance of a permanent residency card does not affect a fundamental right protected by substantive due process.[4]

Barring resident aliens from employment in the federal service,[5] or from other employment in which the federal government is involved,[6] is a deprivation of a liberty interest which must comport with due process of law[7] and be based on an overriding national interest.[8] Accordingly, while due to an overriding national interest resident aliens may be barred from federal employment on the basis of a discriminatory rule which would violate the Constitution if it were adopted by a state,[9] due

process requires that such a federal rule be either expressly mandated by Congress or the President,[10] or that the agency which promulgates the rule justify it by reasons which are properly that agency's concern.[11]

Footnotes

1 U.S.—Wan Chung Wen v. Ferro, 543 F. Supp. 1016 (W.D. N.Y. 1982).

2 U.S.—Mountain High Knitting, Inc. v. Reno, 51 F.3d 216 (9th Cir. 1995).

3 U.S.—Mountain High Knitting, Inc. v. Reno, 51 F.3d 216 (9th Cir. 1995).

4 U.S.—Aliens for Better Immigration Laws v. U.S., 871 F. Supp. 182 (S.D. N.Y. 1994).

5 U.S.—Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir. 1974), judgment aff'd, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

6 U.S.—De Malherbe v. International Union of Elevator Constructors, 438 F. Supp. 1121, 25 Fed. R. Serv. 2d 35 (N.D. Cal. 1977).

7 U.S.—Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

8 U.S.—De Malherbe v. International Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979).

9 U.S.—De Malherbe v. International Union of Elevator Constructors, 476 F. Supp. 649 (N.D. Cal. 1979).

10 U.S.—Vergara v. Hampton, 581 F.2d 1281, 26 Fed. R. Serv. 2d 932 (7th Cir. 1978).

11 U.S.—Hampton v. Mow Sun Wong, 426 U.S. 88, 96 S. Ct. 1895, 48 L. Ed. 2d 495 (1976).

End of Document

16D C.J.S. Constitutional Law § 2156

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

2. Juvenile Justice

§ 2156. Due process rights of juveniles, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4401, 4464 to 4469, 4809

A juvenile faced with confinement in a state institution must be accorded due process of law.

As neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,[1] both procedural[2] and substantive[3] due process rights[4] are applicable to proceedings that may result in the confinement of a juvenile to a state institution[5] or in other sanctions.[6] Denying a parent the right to participate through counsel in delinquency proceedings involving a child, however, does not violate the parent's due process rights.[7]

Some[8] but not all[9] of the due process protections which have to be employed in an adult criminal trial are applicable to juvenile proceedings.[10] The application of constitutional due process standards to juvenile proceedings requires a balancing of the degree to which various due process elements are necessary to insure fundamental fairness against the extent to which such elements are likely to destroy the flexibility and confidentiality which are essential to juvenile proceedings.[11] Accordingly, the due process standard applicable to juvenile proceedings is fundamental fairness[12] with an emphasis on accurate fact finding.[13]

A juvenile facing charges of delinquency is to be accorded a constitutionally adequate notice of charges[14] so the juvenile may prepare a defense,[15] a hearing that measures up to the essentials of due process and fair treatment,[16] the assistance of counsel[17] either retained or appointed,[18] the opportunity to present evidence,[19] the rights of confrontation and cross-examination,[20] and the privilege against self-incrimination.[21] Also, the charges against the juvenile must be proven beyond a reasonable doubt.[22] As a matter of due process, a juvenile also has a right to a speedy[23] trial but not to a trial by jury.[24]

Furthermore, juveniles are entitled, as a matter of due process or the right against self-incrimination, to the exclusion of illegally seized evidence, unconstitutional pretrial identification, judicial admissions not preceded by an explicit waiver of rights, and statements obtained without constitutional admonitions.[25] So, where a confession is determined to have been involuntarily obtained or coerced, due process bars its use in a juvenile court proceeding.[26]

Due process requires the prosecution to disclose all the material evidence to accused in a juvenile proceeding, whether such evidence relates directly to the issue of guilt or can lead the defense to favorable evidence.[27]

Rehabilitative treatment.

It has been declared that juveniles committed to a state correctional institution have a constitutional right, under the Due Process Clause of the Fourteenth Amendment, to rehabilitative treatment,[28] either under a rationale of parens patriae, that is, that the state is the protector of those unable to care for themselves,[29] or a rationale of quid pro quo,[30] if they are detained for a long term.[31] Nevertheless, the question as to whether restrictively placed juveniles have a constitutional due process right to treatment has not been conclusively decided.[32]

In placing a juvenile delinquent in a child care institution, due process does not require that the juvenile be placed in the least restrictive placement where such placement is unavailable.[33]

CUMULATIVE SUPPLEMENT

Cases:

The due process test for determining whether a confession was voluntary permits consideration of a child's age, and it erects a barrier to admission of a defendant's inculpatory statements at trial. U.S.C.A. Const.Amends. 5, 14. J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011).

Defendant charged with first degree murder based on the killing of his mother while he was a juvenile was not entitled to the appointment of a guardian ad litem as a matter of due process, separately and apart from more specifically enumerated rights constitutionally guaranteeing criminal defendants due process. U.S. Const. Amend. 14. Ybanez v. People, 2018 CO 16, 413 P.3d 700 (Colo. 2018).

Due process clause did not provide basis for trial court to order access to private home that was scene of sexual assault allegedly committed by juvenile, which access was sought by juvenile in pretrial discovery during aggravated juvenile offender proceeding for such assault; due process clause provided right of access only to favorable evidence in government's possession or control, and home was not in government's possession or control, and due process clause did not provide juvenile with a right to use court-provided investigative tools. U.S. Const. Amend. 14. People In Interest of E.G., 2016 CO 19, 368 P.3d 946 (Colo. 2016).

Due process did not mandate jury trial for juvenile charged with first degree murder, despite contention that severe deprivation of liberty from mandatory incarceration faced by juvenile charged with first degree murder triggered due process jury trial rights; legislature's grant of statutory jury trial rights in certain juvenile proceedings involving deprivation of liberty did not extend due process rights. U.S. Const. Amend. 14; Ill. Const. art. 1, § 2. In re Destiny P., 2017 IL 120796, 421 Ill. Dec. 868, 102 N.E.3d 149 (Ill. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

2 N.Y.—Matter of Edward S., 80 A.D.2d 585, 435 N.Y.S.2d 771 (2d Dep't 1981).
Ohio—State v. D.H., 120 Ohio St. 3d 540, 2009-Ohio-9, 901 N.E.2d 209 (2009).

3 U.S.—Jackson v. Johnson, 118 F. Supp. 2d 278 (N.D. N.Y. 2000), aff'd in part, dismissed in part on other grounds, 13 Fed. Appx. 51 (2d Cir. 2001).

4 U.S.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).
Ill.—In re Terry H., 2011 IL App (2d) 90909, 351 Ill. Dec. 786, 952 N.E.2d 159 (App. Ct. 2d Dist. 2011).
Md.—Lopez-Sanchez v. State, 388 Md. 214, 879 A.2d 695 (2005) (superseded by statute on other grounds, as stated in Hoile v. State, 404 Md. 591, 948 A.2d 30 (2008)).
Ohio—In re S.B., 121 Ohio St. 3d 279, 2009-Ohio-507, 903 N.E.2d 1175 (2009).

5 N.Y.—Matter of Quinton A., 49 N.Y.2d 328, 425 N.Y.S.2d 788, 402 N.E.2d 126 (1980).

6 Cal.—Richard M. v. Superior Court, 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482 P.2d 664 (1971).

7 Iowa—In Interest of A.H., 549 N.W.2d 824 (Iowa 1996).

8 Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).
Conn.—In re Steven M., 264 Conn. 747, 826 A.2d 156 (2003).

9 U.S.—D. B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1982).

10 Tex.—Herring v. State, 359 S.W.3d 275 (Tex. App. Texarkana 2012), petition for discretionary review granted, (June 20, 2012) and judgment aff'd, 395 S.W.3d 161 (Tex. Crim. App. 2013).

11 D.C.—District of Columbia v. I. P., 335 A.2d 224 (D.C. 1975).

12 U.S.—McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).
Colo.—Flakes v. People, 153 P.3d 427 (Colo. 2007), as modified on denial of reh'g, (Mar. 19, 2007).

13 Cal.—In re Robert G., 31 Cal. 3d 437, 182 Cal. Rptr. 644, 644 P.2d 837 (1982).
Minn.—In re Welfare of R.V., 702 N.W.2d 294 (Minn. Ct. App. 2005).

14 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).
Minn.—State v. Grigsby, 818 N.W.2d 511 (Minn. 2012).
N.D.—In re T.S., 2011 ND 118, 798 N.W.2d 649 (N.D. 2011).

15 Cal.—In re D.W., 236 Cal. App. 4th 313, 186 Cal. Rptr. 3d 464 (1st Dist. 2015).
Ga.—C. L. T. v. State, 157 Ga. App. 180, 276 S.E.2d 862 (1981).

16 U.S.—In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
Cal.—In re John Z., 223 Cal. App. 4th 1046, 167 Cal. Rptr. 3d 811 (1st Dist. 2014).
Colo.—Flakes v. People, 153 P.3d 427 (Colo. 2007), as modified on denial of reh'g, (Mar. 19, 2007).
Minn.—In re Welfare of B.A.H., 845 N.W.2d 158 (Minn. 2014), petition for certiorari filed, 135 S. Ct. 208, 190 L. Ed. 2d 159 (2014).

17 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).
D.C.—In re R.K.S., 905 A.2d 201 (D.C. 2006).
Ill.—People v. Austin M., 2012 IL 111194, 363 Ill. Dec. 220, 975 N.E.2d 22 (Ill. 2012).

18 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

19 U.S.—U.S. v. Thomas C., 68 Fed. Appx. 13 (9th Cir. 2003).
Cal.—In re D.L., 206 Cal. App. 4th 1240, 142 Cal. Rptr. 3d 325 (3d Dist. 2012).
Fla.—J.D.J. v. State, 120 So. 3d 229 (Fla. 4th DCA 2013).

20 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).

21 U.S.—Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).
Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).
N.D.—In re T.S., 2011 ND 118, 798 N.W.2d 649 (N.D. 2011).
Wash.—State v. Kuhlman, 135 Wash. App. 527, 144 P.3d 1214 (Div. 3 2006), review granted, cause remanded, 161 Wash. 2d 1014, 171 P.3d 1056 (2007).

22 U.S.—In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).
Ill.—People v. Beltran, 327 Ill. App. 3d 685, 262 Ill. Dec. 463, 765 N.E.2d 1071 (2d Dist. 2002).
Ohio—In re S.B., 121 Ohio St. 3d 279, 2009-Ohio-507, 903 N.E.2d 1175 (2009).
R.I.—State v. Day, 911 A.2d 1042 (R.I. 2006).
Tex.—In re A.B., 162 S.W.3d 598 (Tex. App. El Paso 2005).

23 Iowa—In Interest of C. T. F., 316 N.W.2d 865 (Iowa 1982).

24 U.S.—McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).
Ga.—In re L.C., 273 Ga. 886, 548 S.E.2d 335 (2001).
Ill.—People v. Austin M., 2012 IL 111194, 363 Ill. Dec. 220, 975 N.E.2d 22 (Ill. 2012).
Pa.—In Interest of J.F., 714 A.2d 467 (Pa. Super. Ct. 1998).

25 Cal.—In re Mitchell P., 22 Cal. 3d 946, 151 Cal. Rptr. 330, 587 P.2d 1144 (1978).

26 Iowa—In Interest of Johnson, 257 N.W.2d 47 (Iowa 1977).

27 Cal.—In re Gary G., 115 Cal. App. 3d 629, 171 Cal. Rptr. 531 (3d Dist. 1981).

28 W. Va.—State ex rel. R.S. v. Trent, 169 W. Va. 493, 289 S.E.2d 166 (1982).

29 U.S.—Morales v. Turman, 383 F. Supp. 53 (E.D. Tex. 1974), judgment rev'd on other grounds, 535 F.2d 864 (5th Cir. 1976), judgment rev'd on other grounds, 430 U.S. 322, 97 S. Ct. 1189, 51 L. Ed. 2d 368 (1977).

30 U.S.—Morales v. Turman, 364 F. Supp. 166 (E.D. Tex. 1973).

31 U.S.—Martarella v. Kelley, 359 F. Supp. 478 (S.D. N.Y. 1973).

32 N.Y.—Matter of Quinton A., 49 N.Y.2d 328, 425 N.Y.S.2d 788, 402 N.E.2d 126 (1980).

33 Iowa—In Interest of B.B., 516 N.W.2d 874 (Iowa 1994).

End of Document

16D C.J.S. Constitutional Law § 2157

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

2. Juvenile Justice

§ 2157. Due process issues regarding detention of juveniles

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4464 to 4469, 4809

The preventive detention of an accused juvenile delinquent based on a finding that there is a serious risk that the juvenile may, before the return date, commit an act that if committed by an adult would constitute a crime, does not violate the Due Process Clause.

The preventive detention of a juvenile charged with a crime prior to a probable cause adjudication on the basis of a judicial finding that there is a serious risk that the juvenile will commit a crime before returning to court does not violate due process of law,[1] since the preventive detention serves a legitimate state objective, so long as procedural protections afforded pretrial detainees are adequate.[2] However, a court has no authority or jurisdiction to send a juvenile to a detention facility indefinitely with no petition against the youth forthcoming and no delinquency adjudication hearing set.[3]

The detention of a juvenile prior to an adjudicatory hearing, without a probable cause hearing, comports with due process of law.[4] Furthermore, fundamental fairness, which is the applicable due process standard in juvenile proceedings, does not to require the admission of juveniles to bail pending the adjudication of their cases.[5]

Footnotes

1 U.S.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).
Youth found incompetent
Mass.—Abbott A. v. Commonwealth, 458 Mass. 24, 933 N.E.2d 936 (2010).

2 U.S.—Schall v. Martin, 467 U.S. 253, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984).

3 Miss.—In re J.P., 151 So. 3d 204 (Miss. 2014).

4 R.I.—Morris v. D'Amario, 416 A.2d 137 (R.I. 1980).

5 Kan.—Pauley v. Gross, 1 Kan. App. 2d 736, 574 P.2d 234 (1977).

End of Document

16D C.J.S. Constitutional Law § 2158

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

2. Juvenile Justice

§ 2158. Due process issues regarding double jeopardy in matters involving juveniles

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4464 to 4469, 4809

The prosecution of a juvenile in an adult court after an adjudicatory proceeding in a juvenile court violates the Double Jeopardy Clause and constitutes a deprivation of liberty without due process of law.

While the precise effect of constitutional due process in juvenile delinquency proceedings differs from that in the adult context, certain constitutional protections associated with criminal prosecutions are extended to minors alleged to be juvenile delinquents, including double jeopardy.[1] Thus, the prosecution of a juvenile in an adult court after an adjudicatory proceeding in a juvenile court violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, and constitutes a deprivation of liberty without due process of law,[2] but no double jeopardy attaches, and no fundamental unfairness ensues, if the hearing in a juvenile court which precedes a prosecution in an adult court is only a transfer hearing.[3]

Moreover, fundamental fairness considerations preclude a de novo adjudicatory hearing, that is, a new hearing of the matter,[4] or the lodging of an appeal[5] where a juvenile has been found not to be delinquent in an adjudicatory juvenile proceeding, but

due process is not denied by the prosecution of a juvenile on charges which have been previously voluntarily dismissed[6] or which have been considered in connection with a probation revocation.[7]

Footnotes

1 Cal.—In re Kevin S., 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178 (2d Dist. 2003).

2 U.S.—Breed v. Jones, 421 U.S. 519, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975).
As to the due process guaranty as applied to prosecution of juveniles in adult courts, see § 2160.

3 Mass.—Com. v. Clark, 379 Mass. 623, 400 N.E.2d 251 (1980).

4 Tex.—Matter of J.R.R., 696 S.W.2d 382 (Tex. 1985).

5 Tex.—State v. Marshall, 503 S.W.2d 875 (Tex. Civ. App. Houston 1st Dist. 1973).

6 Tex.—Matter of J. A. L., 608 S.W.2d 819 (Tex. Civ. App. Amarillo 1980).

7 Tex.—In re D. B., 594 S.W.2d 207 (Tex. Civ. App. Corpus Christi 1980).

16D C.J.S. Constitutional Law § 2159

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

2. Juvenile Justice

§ 2159. Due process issues regarding juvenile status offenders

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4389, 4401, 4464 to 4469, 4809

Status offenders, that is, juveniles who are runaways or out of control of their parents, must be accorded due process of law.

While a state may constitutionally take juveniles into protective custody on the basis of conduct which would not be criminal if committed by adults,[1] status offenders, that is, juveniles who are runaways or out of control of their parents generally must be accorded due process of law.[2] Therefore, counsel for the child must be permitted to present a closing argument in proceedings for the child's adjudication as a delinquent based on habitual truancy.[3] However, it has also been held that a juvenile is not entitled to procedural due process protections prior to disciplinary suspension from school, and therefore adjudication of the juvenile as a status offender on the basis of habitual truancy based on school absences caused by out-of-school suspension does not constitute a procedural due process violation.[4]

Children may not be constitutionally placed in an adult jail,[5] or in a secure penal facility operated primarily for juvenile delinquents where status offenders and delinquents are commingled,[6] as such placement constitutes a punishment which is in

violation of the juveniles' due process rights under the Fourteenth Amendment to the United States Constitution.[7] Rather, in order not to run afoul of due process of law requirements, a state must exhaust every reasonable alternative to incarceration before committing a status offender to a secure, prison-like facility.[8]

The constitutional rights of due process, representation by counsel, notice, opportunity to be heard, and to present and cross-examine witnesses must be afforded to a juvenile and the affected parent in a proceeding brought pursuant to statutory provision that permits a court to award custody of a juvenile status offender to a state's child welfare department.[9]

Footnotes

1 Me.—S* * ** S* * ** v. State, 299 A.2d 560 (Me. 1973).
2 U.S.—D. B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1982).
3 Ky.—T.D. v. Com., 165 S.W.3d 480, 199 Ed. Law Rep. 991 (Ky. Ct. App. 2005).
4 W. Va.—In re Brandi B., 231 W. Va. 71, 743 S.E.2d 882 (2013).
5 U.S.—D. B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1982).
6 Tenn.—Doe v. Norris, 751 S.W.2d 834 (Tenn. 1988).
7 U.S.—D. B. v. Tewksbury, 545 F. Supp. 896 (D. Or. 1982).
8 W. Va.—State ex rel. Harris v. Calendine, 160 W. Va. 172, 233 S.E.2d 318 (1977).
9 W. Va.—In re Brandi B., 231 W. Va. 71, 743 S.E.2d 882 (2013).

16D C.J.S. Constitutional Law § 2160

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

2. Juvenile Justice

§ 2160. Due process issues regarding proceedings involving juveniles in adult courts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4466

In appropriate cases, it is not a violation of due process to prosecute juveniles as if they were adults.

As juveniles have no constitutional right to be tried in a juvenile court,[1] the waiver of jurisdiction by such a court, pursuant to applicable statutes, over a juvenile charged with the commission of a crime, and the transfer of the case to a criminal court, does not violate due process,[2] particularly where the juvenile is represented by counsel and the waiver of jurisdiction is reviewable.[3] However, the waiver procedure must satisfy due process requirements.[4] A mandatory statutory juvenile transfer provision, automatically transferring certain minors from the jurisdiction of the juvenile court to the adult criminal court, does not violate a juvenile defendant's right to procedural or substantive due process following an arrest for a particularly grievous crime.[5] Juveniles may be transferred to adult courts without conducting a hearing to determine whether such prosecution of juveniles as adults would be proper,[6] where the juveniles are charged with the commission of certain enumerated crimes,[7] or where they are prosecuted as adults pursuant to prosecutorial discretion[8] governed by statutory standards.[9]

Due process generally includes obtaining personal jurisdiction by the juvenile court over the juvenile by service of process,[10] a notice of a hearing[11] which is timely and adequate[12] and sufficiently specific,[13] and the hearing itself,[14] which measures up to the essentials of due process and fair treatment.[15] Nevertheless, juveniles do not necessarily have a right to a juvenile court decline hearing in every case; rather, they have a right to a decline hearing only when the statutes authorize the juvenile court to exercise discretion to determine juvenile or adult court jurisdiction.[16]

Due process requires the assistance of counsel,[17] and a statement of reasons by the court for its waiver of jurisdiction[18] which must be supported by substantial evidence.[19]

Procedural safeguards that are applicable by virtue of the due process requirement to criminal trials and adjudications of delinquency are inapplicable to transfer hearings as such hearings are not adjudicatory.[20] The introduction of certain hearsay testimony at transfer hearings does not violate due process,[21] and neither does due process require that the factors that affect the transfer of the trial of a juvenile to an adult court be defined by statute with the same certainty as is required to define an offense.[22] Furthermore, a juvenile has no due process right to have a jury make findings beyond a reasonable doubt during a hearing in the juvenile court to transfer the case to a criminal court even though the juvenile court makes findings that expose the juvenile to a greater sanction.[23] This is so because the hearing does not determine whether the defendant is guilty but only where the juvenile is to be tried.[24]

Nevertheless, it has also been declared that the protection afforded juveniles by the Fifth Amendment against self-incrimination is also applicable to the transfer of a juvenile for a criminal prosecution in an adult court[25] and that, accordingly, stringent steps must be taken to insure that no impermissible use is made of statements made by juveniles during psychiatric interviews conducted in connection with such proceedings.[26] Some courts have held that due process requires the prosecuting attorney to disclose to a juvenile, in hearing to bind the juvenile over for prosecution as an adult, all evidence in the state's possession that is favorable to the juvenile and material either to guilt, innocence, or punishment in a delinquency proceeding.[27]

The due process requirements applicable to juvenile courts' waivers of jurisdiction are applicable as well to proceedings in an adult court for the purpose of determining whether the trial of a juvenile should be transferred to a juvenile court.[28] Nonetheless, placing the burden on juveniles to show that a transfer of their trial from an adult to a juvenile court would be proper does not violate due process of law.[29]

CUMULATIVE SUPPLEMENT

Cases:

Since waiver of juvenile jurisdiction is a critical stage in criminal proceedings against a juvenile, constitutional due process demands that the child, his parents and his counsel be afforded reasonable notice of the waiver hearing, the charge to be considered, a reasonable opportunity to prepare a defense to such waiver, and a meaningful hearing at which evidence on behalf of the juvenile should be permitted. U.S. Const. Amend. 14. State v. J.C., 828 S.E.2d 100 (W. Va. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Md.—In re Samuel M., 293 Md. 83, 441 A.2d 1072 (1982).
2 Tex.—T. P. S. v. State, 590 S.W.2d 946 (Tex. Civ. App. Dallas 1979), writ refused n.r.e., (Mar. 5, 1980).
3 R.I.—In re Correia, 104 R.I. 251, 243 A.2d 759 (1968).
4 Wash.—In re Personal Restraint Petition of Dalluge, 152 Wash. 2d 772, 100 P.3d 279 (2004).
Wis.—State v. Aufderhaar, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4 (2005).
5 Ill.—People v. Patterson, 2014 IL 115102, 388 Ill. Dec. 834, 25 N.E.3d 526 (Ill. 2014).
6 U.S.—Lane v. Jones, 626 F.2d 1296 (5th Cir. 1980).
7 D.C.—Brown v. U. S., 343 A.2d 48 (D.C. 1975).
8 U.S.—U.S. v. Quinones, 516 F.2d 1309 (1st Cir. 1975).
9 Ill.—People ex rel. Carey v. Chrastka, 83 Ill. 2d 67, 46 Ill. Dec. 156, 413 N.E.2d 1269 (1980).
10 Wis.—State v. Aufderhaar, 2005 WI 108, 283 Wis. 2d 336, 700 N.W.2d 4 (2005).
11 U.S.—People of Territory of Guam v. Kingsbury, 649 F.2d 740 (9th Cir. 1981).
12 Haw.—State v. English, 61 Haw. 12, 594 P.2d 1069 (1978).
Unreasonable delay
N.Y.—In re Ricardo R., 180 Misc. 2d 413, 689 N.Y.S.2d 383 (Fam. Ct. 1999).
13 N.D.—In In Interest of P. W. N., 301 N.W.2d 636 (N.D. 1981).
14 U.S.—Kent v. U.S., 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).
Haw.—State v. Sanders, 102 Haw. 326, 76 P.3d 569 (2003).
N.J.—State v. J.M., 182 N.J. 402, 866 A.2d 178 (2005).
15 U.S.—Kent v. U.S., 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).
16 Wash.—In re Personal Restraint Petition of Dalluge, 152 Wash. 2d 772, 100 P.3d 279 (2004).
17 U.S.—Kent v. U.S., 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).
Haw.—State v. Sanders, 102 Haw. 326, 76 P.3d 569 (2003).
N.J.—State v. J.M., 182 N.J. 402, 866 A.2d 178 (2005).
18 U.S.—Kent v. U.S., 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).
Haw.—State v. Sanders, 102 Haw. 326, 76 P.3d 569 (2003).
N.J.—State v. J.M., 182 N.J. 402, 866 A.2d 178 (2005).
19 Haw.—State v. Sanders, 102 Haw. 326, 76 P.3d 569 (2003).
20 Ill.—People v. Taylor, 76 Ill. 2d 289, 29 Ill. Dec. 103, 391 N.E.2d 366 (1979).
21 Tex.—In re C.D.T., 98 S.W.3d 280 (Tex. App. Houston 1st Dist. 2003).
22 Tex.—T. P. S. v. State, 590 S.W.2d 946 (Tex. Civ. App. Dallas 1979), writ refused n.r.e., (Mar. 5, 1980).
23 Ill.—People v. Beltran, 327 Ill. App. 3d 685, 262 Ill. Dec. 463, 765 N.E.2d 1071 (2d Dist. 2002).
24 Ill.—People v. Beltran, 327 Ill. App. 3d 685, 262 Ill. Dec. 463, 765 N.E.2d 1071 (2d Dist. 2002).
Mo.—State v. Nathan, 404 S.W.3d 253 (Mo. 2013).
25 U.S.—Lane v. Jones, 626 F.2d 1296 (5th Cir. 1980).
26 U.S.—U.S. v. J. D., 517 F. Supp. 69 (S.D. N.Y. 1981).
27 Ohio—In re D.M., 140 Ohio St. 3d 309, 2014-Ohio-3628, 18 N.E.3d 404 (2014).
28 Pa.—Com. v. Pyle, 462 Pa. 613, 342 A.2d 101 (1975).
29 Ill.—People v. Beltran, 327 Ill. App. 3d 685, 262 Ill. Dec. 463, 765 N.E.2d 1071 (2d Dist. 2002).

End of Document

16D C.J.S. Constitutional Law § 2161

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2161. Due process issues pertaining to mentally ill persons generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

The commitment of the mentally ill is a deprivation of liberty which must be justified by a compelling state interest.

As the involuntary confinement of the state of nondangerous mentally ill persons who can live safely in freedom is an unconstitutional deprivation of liberty,[1] a state may not, as a matter of substantive due process, civilly commit such persons in the absence of a compelling interest justifying such action.[2] A state may not deprive nondangerous mentally ill persons of their liberty solely for purposes of treatment[3] as protected liberty interests are no less infringed by government action taken for reasons which purport to serve administrative or rehabilitative purposes than by government action taken for disciplinary reasons.[4] Accordingly, to meet due process standards, a statute authorizing the involuntary commitment of mentally ill persons must articulate the state's purpose for such institutionalization[5] and specify precise standards by which physicians and courts are to be governed with respect to commitment authorizations.[6]

A person's liberty interest in freedom from bodily restraint is not absolute; thus, the government may detain mentally unstable individuals who present a danger to the public.[7] The State may take measures to restrict the freedom of the dangerously mentally

ill, which is a legitimate, nonpunitive governmental objective.[8] To comply with due process requirements, however, it must be shown that the involuntary commitment of mentally ill persons is required either because of the danger that such persons pose[9] or because of the inability of such persons to care for themselves.[10]

Due process does not require a showing of imminent or present danger to self or others before ordering a proposed patient into involuntary treatment.[11] Furthermore, it has been declared that due process does not require that the dangerousness of a person subject to involuntary commitment be evidenced by a recent overt act.[12] There is, however, authority to the contrary on this point.[13] In any case, a finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify an indefinite involuntary commitment under a substantive due process analysis.[14]

Involuntary civil commitment proceedings of the mentally ill are governed by due process protections[15] from which a state may not deviate under a parens patriae rationale, that is, a rationale which asserts that the State stands as protector of those unable to care for themselves,[16] inasmuch as such commitments constitute a significant deprivation of liberty and may result in adverse social consequences.[17] However, in view of the significantly different purposes which are served by criminal convictions and civil commitments, due process guaranties applicable to involuntary civil commitments of the mentally ill cannot be ascertained simply by reference to the criminal law process.[18] Rather, the court must take into account fundamental fairness, the interests at stake, and the rights of the respective parties.[19] Accordingly, the civil commitment process is a hybrid procedure, which has elements of both criminal and civil proceedings and to which some,[20] but not all,[21] of the rights guaranteed to criminal defendants are applicable.

Due process requirements with respect to involuntary commitments on the basis of a mental illness may be met by either judicial or administrative proceedings,[22] both with respect to the initial finding of probable cause to detain[23] and with respect to the final determination to commit.[24] The lack of administrative appeal does not violate due process where access to the court is provided by way of direct appeal[25] or habeas corpus.[26]

While confined under state authority, mentally ill persons have the right, under the Fourteenth Amendment, to be secure in their life and person[27] and to custodial care which provides food, shelter, and medical care, as well as safety.[28] The Due Process Clause of the Fourteenth Amendment requires that adequate treatment be provided for mentally ill persons committed to state institutions,[29] whether involuntarily[30] or, according to some courts[31] but not others,[32] voluntarily, for any illness for which treatment is available.[33] On the other hand, it has been declared that mentally ill persons have a due process right to care and treatment if they are committed by the state pursuant to a parens patriae rationale, but such persons have no right to treatment, under the Fourteenth Amendment, where they are committed under the police power of the state due to their dangerousness.[34]

Moreover, due process also requires that the nature and duration of a commitment for mental illness bear some reasonable relation to the purpose for which a person is committed[35] and that an involuntary commitment be terminated where it can no longer be justified.[36] Thus, a statute allowing the continued confinement of an insanity acquittee after a hospital review committee has reported no evidence of mental illness and recommended conditional discharge violates due process.[37] Due process also requires that a state place persons committed for a mental illness in the least restrictive setting available consistent with legitimate safety, care, and treatment objectives,[38] and that where treatment in a hospital is more restrictive of liberty than treatment in community-based facilities, the failure to provide the latter constitutes a deprivation of liberty in violation of the Fourteenth Amendment.[39]

Voluntary patients.

Voluntary patients who seek release from a mental illness commitment must be released forthwith or be treated as involuntary detainees for due process purposes.[40] Commitments due to a mental illness have been deemed to be involuntary as a matter of law, for due process purposes, unless and until there has been a judicial determination in an adversary proceeding, at which the committed person is represented by counsel, that the commitment is in fact a voluntary one.[41]

Insanity defense.

When a criminal defendant establishes by a preponderance of the evidence that the defendant is not guilty of a crime by reason of insanity, the Due Process Clause permits the government, on the basis of the insanity defense, to confine the defendant to a mental institution until such time as the defendant has regained sanity or is no longer a danger, and the defendant can be confined in the hospital for a period longer than the period of incarceration had the defendant been convicted.[42]

CUMULATIVE SUPPLEMENT

Cases:

Pursuant to the Fourteenth Amendment's Due Process Clause, even if a mentally-ill involuntary civil committee represents a danger to himself or others, he may not be housed in jails if less restrictive, secure options, such as a mental hospital or other health facility, are available. U.S. Const. Amend. 14. Bilal v. Geo Care, LLC, 981 F.3d 903 (11th Cir. 2020).

Due process requires that mental abnormality and dangerousness be inextricably intertwined, such that involuntary civil confinement as a sexually violent predator is limited to those who suffer from a volitional impairment rendering them dangerous beyond their control. U.S. Const. Amend. 14; Mo. Ann. Stat. § 632.480(5). Matter of D.N., 598 S.W.3d 108 (Mo. 2020).

Statutory provision stating that county seeking to extend involuntary commitment can prove dangerousness by showing substantial likelihood that individual would be proper subject for commitment if treatment were withdrawn was facially constitutional, despite due-process objections; provision did not change requirement that county had to prove by clear and convincing evidence that individual was mentally ill, proper subject for treatment, and currently dangerous. U.S. Const. Amend. 14; Wis. Stats. § 51.20(1)(am). Matter of Commitment of K.E.K., 2021 WI 9, 395 Wis. 2d 460, 954 N.W.2d 366 (2021).

Rational basis review applied to inmate's facial due process challenge to statute under which he was committed to mental health facility; inmate's specific right to freedom from physical restraint had already been curbed because he was incarcerated. U.S.C.A. Const.Amend. 14; W.S.A. Const. Art. 1, § 1; W.S.A. 51.20(1)(ar). In re Mental Commitment of Christopher S., 2016 WI 1, 366 Wis. 2d 1, 878 N.W.2d 109 (2016).

Petitioner for involuntary commitment must, as required by due process, prove that individual is both mentally ill and dangerous. U.S. Const. Amend. 14. Matter of D.K., 2020 WI 8, 937 N.W.2d 901 (Wis. 2020).

For petitioner for involuntary commitment to prove, as required by due process, that individual is both mentally ill and dangerous, it is not sufficient to show that individual is mentally ill, nor is it sufficient to show mere public intolerance or animosity. U.S. Const. Amend. 14. Matter of D.K., 2020 WI 8, 937 N.W.2d 901 (Wis. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—O'Connor v. Donaldson, 422 U.S. 563, 95 S. Ct. 2486, 45 L. Ed. 2d 396 (1975).

2 U.S.—Colyar v. Third Judicial Dist. Court for Salt Lake County, 469 F. Supp. 424 (D. Utah 1979).

3 Cal.—Conservatorship of Davis, 124 Cal. App. 3d 313, 177 Cal. Rptr. 369 (2d Dist. 1981).

4 U.S.—Davis v. Balson, 461 F. Supp. 842, 11 Ohio Op. 3d 360 (N.D. Ohio 1978).

5 Ill.—People v. Reliford, 65 Ill. App. 3d 177, 21 Ill. Dec. 778, 382 N.E.2d 72 (1st Dist. 1978).

6 U.S.—Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975).

7 Iowa—In re Detention of Matlock, 860 N.W.2d 898 (Iowa 2015).

8 U.S.—Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

9 Tex.—Ex parte Webb, 625 S.W.2d 372 (Tex. Civ. App. San Antonio 1981), dismissed.

Physical restraint

U.S.—Zadvydas v. Davis, 533 U.S. 678, 121 S. Ct. 2491, 150 L. Ed. 2d 653 (2001).

10 N.Y.—Scopes v. Shah, 59 A.D.2d 203, 398 N.Y.S.2d 911 (3d Dep't 1977).

11 Kan.—Matter of Albright, 17 Kan. App. 2d 135, 836 P.2d 1 (1992).

Mo.—Murrell v. State, 215 S.W.3d 96 (Mo. 2007).

12 U.S.—U. S. ex rel. Mathew v. Nelson, 461 F. Supp. 707 (N.D. Ill. 1978).

Wash.—In re Detention of Fair, 167 Wash. 2d 357, 219 P.3d 89 (2009).

13 U.S.—Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975).

14 U.S.—Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

15 U.S.—Jones v. U.S., 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983).

N.J.—Gormley v. Wood-El, 218 N.J. 72, 93 A.3d 344 (2014).

16 Wash.—Quesnell v. State, 83 Wash. 2d 224, 517 P.2d 568 (1973).

17 U.S.—Doe v. Gallinot, 657 F.2d 1017 (9th Cir. 1981).

18 D.C.—In re Kossow, 393 A.2d 97 (D.C. 1978).

19 D.C.—In re Kossow, 393 A.2d 97 (D.C. 1978).

20 N.M.—Matter of Valdez, 1975-NMSC-050, 88 N.M. 338, 540 P.2d 818 (1975).

21 Tex.—State for Interest and Protection of Ellenwood, 567 S.W.2d 251 (Tex. Civ. App. Amarillo 1978).

22 U.S.—Anderson v. Solomon, 315 F. Supp. 1192 (D. Md. 1970).

Regarding the due process guaranty as affecting procedures and evidence with respect to the commitment of mentally ill persons, see §§ 2166 to 2168.

23 U.S.—Doe v. Gallinot, 486 F. Supp. 983 (C.D. Cal. 1979), judgment aff'd, 657 F.2d 1017 (9th Cir. 1981).

24 U.S.—Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975).

25 Tex.—In re Mastin, 521 S.W.2d 150 (Tex. Civ. App. Dallas 1975).

26 Idaho—Glasco v. Brassard, 94 Idaho 162, 483 P.2d 924 (1971).

27 U.S.—Spence v. Staras, 507 F.2d 554 (7th Cir. 1974).

28 U.S.—Seide v. Prevost, 536 F. Supp. 1121 (S.D. N.Y. 1982).

N.J.—Gormley v. Wood-El, 218 N.J. 72, 93 A.3d 344 (2014).

29 U.S.—Seide v. Prevost, 536 F. Supp. 1121 (S.D. N.Y. 1982).

30 U.S.—Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978).

31 U.S.—Seide v. Prevost, 536 F. Supp. 1121 (S.D. N.Y. 1982).

32 Mass.—Williams v. Hartman, 413 Mass. 398, 597 N.E.2d 1024 (1992).

33 U.S.—Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

34 U.S.—Rone v. Fireman, 473 F. Supp. 92 (N.D. Ohio 1979).

35 Mo.—In re Brasch, 332 S.W.3d 115 (Mo. 2011).

Ohio—State v. Williams, 126 Ohio St. 3d 65, 2010-Ohio-2453, 930 N.E.2d 770 (2010).

Wash.—State v. Klein, 156 Wash. 2d 102, 124 P.3d 644 (2005).

36 U.S.—Rone v. Fireman, 473 F. Supp. 92 (N.D. Ohio 1979).

37 U.S.—Foucha v. Louisiana, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

38 U.S.—Eubanks v. Clarke, 434 F. Supp. 1022 (E.D. Pa. 1977).

39 U.S.—Rone v. Fireman, 473 F. Supp. 92 (N.D. Ohio 1979).

40 Ark.—Von Luce v. Rankin, 267 Ark. 34, 588 S.W.2d 445 (1979).

41 U.S.—Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

42 U.S.—Jones v. U.S., 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983).

End of Document

16D C.J.S. Constitutional Law § 2162

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2162. Due process issues pertaining to mentally ill or allegedly mentally ill sex offenders

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2820 to 2822, 4342 to 4344

Even if the public notification provisions of a state's sex offender registration law deprive sex offenders of a liberty interest, the Due Process Clause does not entitle offenders to a hearing to determine whether they are currently dangerous before their inclusion in a publicly disseminated sex offender registry.

Involuntary commitments of sexually violent persons do not violate the constitutional prohibition against substantive due process.[1] Due process requires that the conditions and duration of confinement under the civil commitment provisions of a state sexually violent predator statute bare some reasonable relation to the purposes for which persons are committed under the statute.[2]

Certain laws require that any convicted sex offender register and make public the place where the offender lives. Even if the public notification provisions of a state's sex offender registration law deprive sex offenders of a liberty interest, the Due Process Clause does not entitle offenders to a hearing to determine whether they are currently dangerous before their inclusion in a publicly disseminated sex offender registry where the issue of dangerousness is not material under the registration law.[3] The sex offender's liberty interest is protected because such laws' requirements turns on the offender's conviction alone, a fact that

the offender already has had a procedurally safeguarded opportunity to contest.[4] Nevertheless, a provision in a sex offender registration statute requiring the publication of an offender's targets in sex offender registry, which information implies that the defendant is currently dangerous, affects the offender's liberty interest in reputation and violates federal procedural due process if the offender is not provided with notice and a hearing on whether the offender is currently dangerous.[5] The label of "violent sexual predator" is a badge of infamy attached by the state that necessitates due process protections.[6]

Lifetime registration, notification, and counseling obligations of sexually violent predators are not considered punitive and, therefore, do not violate due process.[7] A registration requirement as applied to group of residents of a state who had not been adjudicated to be sexually violent predators, but who were required to register as sex offenders because each had previously been convicted of or pled guilty to crimes that made them subject to registration requirements, does not violate the procedural due process clause of a state constitution.[8]

CUMULATIVE SUPPLEMENT

Cases:

Prohibition on loitering within 1,000 feet of school property in Michigan's Sex Offenders Registration Act (SORA), in which "loiter" meant "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing and contacting minors," was unconstitutionally vague as applied to registrants in violation of Due Process Clause; in certain circumstances, it would be difficult to determine whether a registrant was standing in exclusionary zone for purpose of observing or contacting minors. U.S.C.A. Const.Amend. 14; M.C.L.A. § 28.733(b). Doe v. Snyder, 101 F. Supp. 3d 672 (E.D. Mich. 2015).

Sex offenders' state law due process allegations that they did not receive notice or an opportunity to be heard before Sex Offender Registry Board (SORB) published their information online were sufficient to state claim against SORB for violation of their due process rights under Massachusetts Declaration of Rights. Mass. Const. pt. 1, art. 1. Doe v. Sex Offender Registry Board, 94 Mass. App. Ct. 52, 112 N.E.3d 276 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Wis.—In re Commitment of Gilbert, 2012 WI 72, 342 Wis. 2d 82, 816 N.W.2d 215 (2012).

2 U.S.—Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001).
Privilege against self-incrimination
Fourteenth Amendment's guarantee of due process did not require application of Fifth Amendment's privilege against self-incrimination to proceedings under Illinois Sexually Dangerous Persons Act.
U.S.—Allen v. Illinois, 478 U.S. 364, 106 S. Ct. 2988, 92 L. Ed. 2d 296 (1986).

3 U.S.—Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

4 U.S.—Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003).

5 Utah—State v. Briggs, 2008 UT 83, 199 P.3d 935 (Utah 2008).

6 Idaho—Smith v. State, 146 Idaho 822, 203 P.3d 1221 (2009).

7 Pa.—Com. v. Lee, 594 Pa. 266, 935 A.2d 865 (2007).

8 Mo.—Doe v. Phillips, 194 S.W.3d 833 (Mo. 2006).

End of Document

16D C.J.S. Constitutional Law § 2163

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2163. Due process issues pertaining to forcible administration of drugs to mentally ill persons

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

The forced or unwanted administration of antipsychotic drugs implicates a significant liberty interest and therefore implicates the full panoply of due process protections.

Competent individuals retain a significant liberty interest in avoiding forced medication of psychotropic drugs.[1] Persons who are mentally ill have a federal constitutionally protected liberty interest to refuse the administration of psychotropic medication; the State, however, has a legitimate parens patriae interest in furthering the treatment of the mentally ill by forcibly administering treatment to those individuals incapable of making a sound decision.[2] An individual's liberty interest in avoiding involuntary administration of antipsychotic drugs is an interest that only an essential or overriding state interest might overcome.[3]

The forcible administration of drugs raises due process concerns, as such administration may affect the patients' interests in their own bodily integrity, personal dignity, independent decision making, and ability to think and communicate freely.[4] In other words, the forced[5] or unwanted[6] administration of drugs implicates a significant liberty interest and therefore implicates the full

panoply of due process protections.[7] Consequently, persons have a liberty interest to refuse the administration of psychotropic drugs.[8]

The State's interests must be balanced against the involuntarily committed person's rights under Federal Due Process Clause,[9] and as a constitutional minimum, the State must have at least probable cause to believe that a patient is presently violent or self-destructive before it may disregard a patient's interest in refusing treatment,[10] and it may not administer drugs forcibly to a patient committed for a mental illness, in the absence of an emergency, without the holding of some hearing which complies with due process requirements and at which the patient is entitled to the assistance of counsel.[11]

Involuntary treatment of a physically intrusive nature violates due process of law when it is administered to persons who are not found clearly and convincingly[12] to suffer from a mental illness of any sort[13] or who have been committed by reference to standards which are impermissibly vague and overbroad.[14]

CUMULATIVE SUPPLEMENT

Cases:

The forcible administration of antipsychotic medication constitutes a deprivation of liberty in the most literal and fundamental sense, and it may only be overcome by an essential or overriding state interest. U.S. v. Sheikh, 138 F. Supp. 3d 643 (E.D. N.C. 2015), aff'd, 2016 WL 3074313 (4th Cir. 2016).

Mere inability of inmate to express understanding of medication or make informed choice is constitutionally insufficient to override inmate's significant liberty interest in avoiding involuntary medication, as is relevant to due process. U.S. Const. Amend. 14. Matter of Commitment of C.S., 2020 WI 33, 940 N.W.2d 875 (Wis. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Wis.—In re Melanie L., 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607 (2013).

2 Ill.—In re Rita P., 2014 IL 115798, 381 Ill. Dec. 445, 10 N.E.3d 854 (Ill. 2014).

3 Conn.—State v. Seekins, 299 Conn. 141, 8 A.3d 491 (2010).

4 U.S.—Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980).

5 Ohio—In re Beekman, 144 Ohio App. 3d 349, 760 N.E.2d 59 (10th Dist. Franklin County 2001).

6 U.S.—Mills v. Rogers, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982).
Ohio—Steele v. Hamilton Cty. Community Mental Health Bd., 90 Ohio St. 3d 176, 2000-Ohio-47, 736 N.E.2d 10 (2000).

7 Ill.—In re Rita P., 2014 IL 115798, 381 Ill. Dec. 445, 10 N.E.3d 854 (Ill. 2014).
N.M.—State v. Cantrell, 2008-NMSC-016, 143 N.M. 606, 179 P.3d 1214 (2008).
Wash.—In re Detention of Fair, 167 Wash. 2d 357, 219 P.3d 89 (2009).

8 U.S.—Rennie v. Klein, 720 F.2d 266 (3d Cir. 1983).
S.D.—Steinkruger v. Miller, 2000 SD 83, 612 N.W.2d 591 (S.D. 2000).

9 Ill.—In re C.E., 161 Ill. 2d 200, 204 Ill. Dec. 121, 641 N.E.2d 345 (1994).
S.D.—Steinkruger v. Miller, 2000 SD 83, 612 N.W.2d 591 (S.D. 2000).

10 U.S.—Davis v. Hubbard, 506 F. Supp. 915 (N.D. Ohio 1980).

11 U.S.—Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978).

12 U.S.—Dautremont v. Broadlawns Hosp., 827 F.2d 291 (8th Cir. 1987).

13 U.S.—Bell v. Wayne County General Hospital At Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974).

14 U.S.—Bell v. Wayne County General Hospital At Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974).

Not unconstitutionally vague

U.S.—Hightower by Dahler v. Olmstead, 959 F. Supp. 1549 (N.D. Ga. 1996), aff'd, 166 F.3d 351 (11th Cir. 1998).

End of Document

16D C.J.S. Constitutional Law § 2164

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2164. Due process issues pertaining to mentally ill minors

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4347, 4348

Minors subject to commitment to a facility for the treatment of mental illnesses must be accorded due process of law.

As minors have a protectable liberty interest in not being unnecessarily confined for medical treatment and in not being erroneously labeled as mentally ill,[1] procedural due process is applicable to the commitment of minors to a facility for the treatment of mental illnesses,[2] even where such commitment is sought by their parents.[3] The commitment of a child by parents or guardians comports with due process if there is some form of inquiry into the underlying facts of the case, conducted by a neutral fact finder who may or may not be a judicial officer; in fact, a medically trained specialist in the field of mental health will suffice.[4] The involuntary civil commitment of a minor under a specified age may also require a showing, by clear and convincing evidence and determined by specific and particularized findings of fact, that the minor is mentally ill, as defined in terms of childhood mental illness; that the minor is in need of intensive, institutional psychiatric treatment that cannot be provided in the home, the community, or on an outpatient basis; and that the minor's condition due to mental illness poses a danger to the minor or to others, including the substantial likelihood of a significant developmental harm if treatment is not provided.[5] Furthermore, the commitment of minors on the basis of an alleged mental illness must be based on standards subject

to meaningful subsequent review, both as to the initial decision to commit and as to the continuation of the commitment and the treatment.[6]

Due to the risk of error inherent in a parental decision to have a minor institutionalized for mental health care, it is required that a neutral fact finder determine whether statutory requirements for institutionalization have been satisfied, and the necessity for continuing the commitment must be periodically reviewed by a similarly independent procedure.[7] Due process does not require, however, that the neutral fact finder be a judicial or administrative officer as the use of a staff physician to evaluate the need for treatment suffices.[8] However, due process does require that the standards which are to be applied in admitting minors to a state facility for the treatment of a mental illness, upon the application of their parents or guardians, be established by the legislature and not by the admitting hospital.[9]

Although a state's deep and abiding interest in insuring the mental health and well-being of its children authorizes the state to provide treatment and care for children who suffer from mental illness, and who may benefit from such care, that interest is not sufficiently compelling to justify curtailment of the child's liberty interests by involuntary commitment to a psychiatric hospital.[10]

The interest of voluntarily committed minors in personal liberty requires that they be afforded a precommitment hearing, which may be administrative rather than judicial;[11] nevertheless, although a state is free to require such a hearing, due process is not violated by the use of informal, traditional, medical, investigative techniques, in lieu of the conduct of a formal or quasi-formal hearing in order to establish the permissibility of the voluntary commitment by a parent or guardian of a minor.[12]

The Fourteenth Amendment requires that a state facility for mentally disturbed children provide a safe environment to committed children.[13]

Assistance of counsel.

Assistance of counsel has been required, as a matter of due process, for a minor faced with commitment to a facility for the treatment of mental illnesses, either involuntarily[14] or on the application of a parent or guardian.[15] Thus, deprivation of such right constitutes deprivation of due process.[16]

The roles of a guardian ad litem, that is, a court appointed guardian for purposes of the case, and counsel for the juvenile are not required to be split when parents civilly commit a child.[17]

Footnotes

1 U.S.—Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

2 N.Y.—People ex rel. Thorpe on Behalf of Richard M. v. Clark, 62 A.D.2d 216, 403 N.Y.S.2d 910 (2d Dep't 1978).

3 N.C.—In re Long, 25 N.C. App. 702, 214 S.E.2d 626 (1975).

4 U.S.—Clark v. Cohen, 613 F. Supp. 684 (E.D. Pa. 1985), judgment aff'd, 794 F.2d 79 (3d Cir. 1986).

5 N.J.—Matter of Commitment of N.N., 146 N.J. 112, 679 A.2d 1174 (1996).

6 U.S.—Johnson v. Solomon, 484 F. Supp. 278 (D. Md. 1979).

7 U.S.—Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

8 U.S.—Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).

9 Colo.—P. F. v. Walsh, 648 P.2d 1067 (Colo. 1982).

10 N.J.—Matter of Commitment of N.N., 146 N.J. 112, 679 A.2d 1174 (1996).
11 Cal.—In re Roger S., 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977).
12 U.S.—Parham v. J. R., 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).
13 U.S.—Wyatt By and Through Rawlins v. Poundstone, 892 F. Supp. 1410 (M.D. Ala. 1995).
14 U.S.—Johnson v. Solomon, 484 F. Supp. 278 (D. Md. 1979).
15 Cal.—In re Roger S., 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977).
16 Wash.—State ex rel. T.B. v. CPC Fairfax Hosp., 129 Wash. 2d 439, 918 P.2d 497 (1996).
17 Neb.—In re J.K., 265 Neb. 253, 656 N.W.2d 253 (2003).

End of Document

16D C.J.S. Constitutional Law § 2165

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2165. Due process issues pertaining to mentally ill minors—Juvenile sex offenders

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4347, 4348

The lifetime registration provisions of a sex offender statute, as applied to juveniles, are contrary to the juvenile system's core emphasis on individual, corrective treatment and rehabilitation and violated offenders' due process rights.

The lifetime registration provisions of a sex offender statute, as applied to juveniles, violates juvenile offenders' due process rights by utilizing the irrebuttable presumption that all juvenile offenders pose a high risk of committing additional sexual offenses. The registration requirements improperly encroach on juvenile offenders' protected right to reputation with an indelible mark of the dangerous recidivist.[1] Such a provision is contrary to the juvenile system's core emphasis on individual, corrective treatment and rehabilitation.[2] Where a juvenile is subjected to sex offender registration, there must be other procedural protections in place for juvenile adjudications, along with provision allowing the minor the additional procedural right to seek termination of registration, in order to satisfy the minor's constitutional right to procedural due process.[3]

A statutory provision for the retroactive application of mandatory sex offender registration and community notification requirements on juveniles adjudicated for certain sex offenses has been found to be rationally related to protecting the public from juvenile sex offenders and thus to be constitutional under due process requirements. A juvenile's right to have records

of juvenile adjudications for sex offenses kept confidential is not a fundamental right protected by the substantive component of the Fourteenth Amendment[4]

A juvenile sex offender's extended civil commitment does not violate the constitutional right to due process of law, notwithstanding that the petition to extend the commitment does not allege, and the trial court does not specifically find, a serious and well-founded risk of reoffense if not committed. Due process is satisfied if the statute requires a finding of a mental disorder resulting in dangerousness, and it properly links that finding to a second required finding that the mental disorder caused the inability to control dangerous behavior.[5]

CUMULATIVE SUPPLEMENT

Cases:

Statute requiring mandatory sex offender registration for juveniles over 14 years of age who committed their sex crimes by force or threat of serious violence, by rendering victim unconscious, or by involuntarily drugging of the victim did not violate constitutional prohibition against cruel and unusual punishment; juvenile court retained authority to determine, at time dispositional order was terminated, whether to continue a juvenile's sex offender registration. U.S. Const. Amend. 8; Iowa Const. art. 1, § 17; Iowa Code Ann. §§ 692A.103(4). In Interest of T.H., 913 N.W.2d 578 (Iowa 2018).

State Constitution's substantive due process guarantee was violated by statute imposing lifetime bar on juveniles adjudicated delinquent of certain sex offenses from seeking relief from registration and community notification requirements applicable to sex offenders; continued constraints on lives and liberty of individuals long after they had become adults took on punitive aspect that could not be justified. N.J. Const. art. 1, par. 1; N.J. Stat. Ann. § 2C:7-2(g). State in Interest of C.K., 233 N.J. 44, 182 A.3d 917 (2018).

Juvenile sex offender had adequate notice, consistent with due process, of the hearing to determine whether the adult portion of his blended serious youth offender sentence would be invoked, although juvenile's counsel claimed he had not been served with the state's motion to invoke until the day of the hearing, where the juvenile court scheduled the date of the invocation hearing at a review hearing, at which juvenile was not present, but his counsel was, almost two weeks before the date of the invocation hearing, and juvenile was aware that the only reason for the invocation hearing was his failure to participate meaningfully in sex offender treatment. U.S. Const. Amend. 14.; Ohio Rev. Code Ann. §§ 2152.12(G), 2152.14(D). In re A.W., 2018-Ohio-2644, 116 N.E.3d 819 (Ohio Ct. App. 8th Dist. Cuyahoga County 2018), appeal allowed in part, 154 Ohio St. 3d 1422, 2018-Ohio-4496, 111 N.E.3d 20 (2018).

Legislative classification imposing mandatory registration of 16 and 17 year old juvenile sex offenders, but discretionary registration for 14 and 15 year old offenders, did not violate equal protection rights of 17 year old offender. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 2; R.C. § 2152.83(A, B). In re T.M., 2016-Ohio-8425, 78 N.E.3d 349 (Ohio Ct. App. 11th Dist. Geauga County 2016).

[END OF SUPPLEMENT]

Footnotes

1 Pa.—In re J.B., 107 A.3d 1 (Pa. 2014).

2 Ohio—In re C.P., 131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729 (2012).

3 Ill.—People ex rel. Birkett v. Konetski, 233 Ill. 2d 185, 330 Ill. Dec. 761, 909 N.E.2d 783 (2009).

4 Nev.—State v. Eighth Jud. Dist. Ct. (Logan D.), 306 P.3d 369, 129 Nev. Adv. Op. No. 52 (Nev. 2013).

5 Cal.—In re Lemanuel C., 41 Cal. 4th 33, 58 Cal. Rptr. 3d 597, 158 P.3d 148 (2007).

End of Document

16D C.J.S. Constitutional Law § 2166

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2166. Due process issues of procedure and evidence in matters involving mentally ill persons

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

Procedures leading to the involuntary commitment of persons on the basis of mental illness must comport with due process of law.

An emergency commitment of an apparently mentally ill person, without a prior notice and hearing, does not violate due process of law[1] where immediate action is necessary for the protection of society or for the welfare of the allegedly mentally ill person.[2] Due process safeguards are, however, applicable to nonemergency, nonconsensual commitments pursuant to mental health laws,[3] and persons involuntarily confined on the basis of alleged mental illness must be accorded a hearing after being taken into custody[4] to determine whether probable cause exists for their continued detention[5] except that such a hearing may be judicially postponed due to the adverse effect which it may have on the patient or due to other emergency conditions.[6] Three factors determine whether an involuntary commitment hearing comports with due process requirements: the private interest affected, the risk of error inherent in the procedure, and the government interest in the procedure.[7]

An allegedly mental ill person may not be committed for an extended period of time following a probable cause hearing without affording such person a full adjudicatory hearing,[8] or, at least, a review of the court commissioners' probable cause determination,[9] which must, accordingly, be held within a reasonable length of time after the probable cause hearing.[10] This is so because an individual must have an adequate means of testing the validity of confinement within a reasonable period of time.[11] Even so, due process does not require a jury trial for a civil commitment.[12]

Unless an individual has an adequate means of testing the validity of confinement within a reasonable period of time,[13] due process generally requires that a constitutionally adequate notice be furnished to persons subject to commitment proceedings[14] and that they be represented by counsel,[15] effectively,[16] at the earliest stage of the proceedings[17] and on appeal,[18] commensurate with the individual's need for timely preparation of a defense or advancement of an argument for alternative modes of treatment.[19] Due process also requires that persons subject to public commitment be advised of their right to be represented by counsel at public expense, if necessary,[20] and a court will deprive an alleged mentally ill person of the due process right to assistance of counsel where the court permits the person to proceed pro se without determining whether a waiver of the right to counsel is valid.[21] Due process requires that a person subject to an involuntary commitment proceeding make an intelligent waiver of the right to counsel.[22] Some courts, however, maintain that the Due Process Clause does not require an appointment of counsel throughout the insanity acquittee's commitment.[23]

Procedural due process rights are also to be accorded to mentally ill persons who are subject to be transferred from minimum to maximum security facilities,[24] or from a hospital to a prison,[25] from prison to a hospital,[26] or who are subject to placement in isolation[27] or to a withdrawal of privileges[28] for disciplinary rather than medical reasons.[29]

Regulations affording involuntarily committed patients an opportunity to appeal a proposed transfer from a municipal acute-care facility to a state institution and requiring an opportunity for the receiving hospital to examine the patients prior to admission adequately meet any necessary procedural safeguards.[30]

Footnotes

1 U.S.—Logan v. Arafeh, 346 F. Supp. 1265 (D. Conn. 1972), judgment aff'd, 411 U.S. 911, 93 S. Ct. 1556, 36 L. Ed. 2d 304 (1973).

2 Colo.—Tracz ex rel. Tracz v. Charter Centennial Peaks Behavioral Health Systems, Inc., 9 P.3d 1168 (Colo. App. 2000).

3 U.S.—Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976).

4 Mass.—In re Bolduc, 2001 Mass. App. Div. 4, 2001 WL 43585 (2001).
Within seven days
N.M.—New Mexico Dept. of Health v. Compton, 2001-NMSC-032, 131 N.M. 204, 34 P.3d 593 (2001).
Sex offender
Fla.—Jenkins v. State, 803 So. 2d 783 (Fla. 5th DCA 2001).

5 Ind.—Matter of Tedesco, 421 N.E.2d 726 (Ind. Ct. App. 1981).

6 Minn.—State ex rel. Doe v. Madonna, 295 N.W.2d 356 (Minn. 1980).

7 Me.—In re Kevin C., 2004 ME 76, 850 A.2d 341 (Me. 2004).

8 Ark.—Von Luce v. Rankin, 267 Ark. 34, 588 S.W.2d 445 (1979).

9 Wis.—In re Commitment of Louise M., 205 Wis. 2d 162, 555 N.W.2d 807 (1996).

10 U.S.—French v. Blackburn, 428 F. Supp. 1351 (M.D. N.C. 1977), judgment aff'd, 443 U.S. 901, 99 S. Ct. 3091, 61 L. Ed. 2d 869 (1979).

11 N.J.—In re Commitment of M.G., 331 N.J. Super. 365, 751 A.2d 1101 (App. Div. 2000).

12 Ariz.—County Attorney, Pima County v. Kaplan, 124 Ariz. 510, 605 P.2d 912 (Ct. App. Div. 2 1980).
13 N.J.—In re Commitment of M.G., 331 N.J. Super. 365, 751 A.2d 1101 (App. Div. 2000).
14 D.C.—Brown v. U.S., 682 A.2d 1131 (D.C. 1996).
N.J.—City of Newark v. J.S., 279 N.J. Super. 178, 652 A.2d 265, 9 A.D.D. 322 (Law Div. 1993).
15 Ark.—Honor v. Yamuchi, 307 Ark. 324, 820 S.W.2d 267 (1991).
N.J.—City of Newark v. J.S., 279 N.J. Super. 178, 652 A.2d 265, 9 A.D.D. 322 (Law Div. 1993).
N.D.—In Interest of R.Z., 415 N.W.2d 486 (N.D. 1987).
16 Tex.—Ex parte Ullmann, 616 S.W.2d 278 (Tex. Civ. App. San Antonio 1981), dismissed, (June 16, 1982).
17 Ohio—In re Moser, 124 Ohio App. 3d 117, 705 N.E.2d 712 (2d Dist. Clark County 1997).
18 N.J.—In re Civil Commitment of D.L., 351 N.J. Super. 77, 797 A.2d 166 (App. Div. 2002).
19 Ohio—In re Moser, 124 Ohio App. 3d 117, 705 N.E.2d 712 (2d Dist. Clark County 1997).
20 Ind.—In re Turner, 439 N.E.2d 201 (Ind. Ct. App. 1982).
21 Ohio—In re Moser, 124 Ohio App. 3d 117, 705 N.E.2d 712 (2d Dist. Clark County 1997).
22 Ark.—Honor v. Yamuchi, 307 Ark. 324, 820 S.W.2d 267 (1991).
23 U.S.—U.S. v. Nakamoto, 2 F. Supp. 2d 1289 (D. Haw. 1998).
24 U.S.—Davis v. Balson, 461 F. Supp. 842, 11 Ohio Op. 3d 360 (N.D. Ohio 1978).
25 U.S.—Romero v. Schauer, 386 F. Supp. 851 (D. Colo. 1974).
26 Cal.—People v. Carmony, 99 Cal. App. 4th 317, 120 Cal. Rptr. 2d 896 (3d Dist. 2002).
27 U.S.—Davis v. Balson, 461 F. Supp. 842, 11 Ohio Op. 3d 360 (N.D. Ohio 1978).
28 U.S.—Davis v. Balson, 461 F. Supp. 842, 11 Ohio Op. 3d 360 (N.D. Ohio 1978).
29 U.S.—Eckerhart v. Hensley, 475 F. Supp. 908 (W.D. Mo. 1979).
30 N.Y.—Savastano v. Nurnberg, 77 N.Y.2d 300, 567 N.Y.S.2d 618, 569 N.E.2d 421 (1990).

End of Document

16D C.J.S. Constitutional Law § 2167

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2167. Due process issues of procedure and evidence in matters involving mentally ill persons—Presence of patient at commitment hearing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

A person subject to civil commitment ordinarily has a due process right to be present at the person's own commitment hearing.

A person subject to civil commitment has a due process right to be present at such person's own commitment hearing,[1] to be heard,[2] to offer evidence,[3] and to cross-examine witnesses.[4] Nevertheless, holding a commitment hearing in the absence of the person subject to commitment does not violate due process requirements where the right to be present has been knowingly and intelligently waived,[5] or where the court has ordered the removal of such person from the hearing because of disruptive conduct,[6] or where there has been a prior judicial determination that such person is incapable of attending the hearing because of a mental or physical illness.[7]

However, where a person subject to civil commitment is unable to appear at a commitment hearing for medical reasons, due process requirements may be violated by a failure to attempt an alternative to total exclusion.[8] It is not a violation of due process

to exclude a committed patient from a portion of a final hearing where the hearing of particular testimony might be detrimental to a recovery provided that the patient's attorney is present during such testimony.[9]

CUMULATIVE SUPPLEMENT

Cases:

Trial court's allowance of telephonic testimony at hearing on petition for 30-day involuntary commitment did not violate procedural due process; risk of erroneous deprivation of right to confront witnesses was low, as committee's attorney cross-examined witnesses but chose not to attack their credibility during cross-examination, and therefore, committee could not show that he likely would have obtained different outcome had witnesses been required to testify in person, and State's interest in protection of public from potentially dangerous persons warranted flexibility in gathering and presentation of evidence, given requirement that hearing on commitment petition be held within 72 hours of committee's initial detention. U.S. Const. Amend. 14; Alaska St. § 47.30.725(b). Matter of Jacob S., 384 P.3d 758 (Alaska 2016).

[END OF SUPPLEMENT]

Footnotes

1 Ill.—Matter of Perona, 294 Ill. App. 3d 755, 229 Ill. Dec. 11, 690 N.E.2d 1058 (4th Dist. 1998).

2 N.Y.—Application of Weingarten, 94 Misc. 2d 788, 405 N.Y.S.2d 605 (Ct. Cl. 1978).

3 N.J.—In re Commitment of M.G., 331 N.J. Super. 365, 751 A.2d 1101 (App. Div. 2000).

4 U.S.—Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

5 U.S.—French v. Blackburn, 428 F. Supp. 1351 (M.D. N.C. 1977), judgment aff'd, 443 U.S. 901, 99 S. Ct. 3091, 61 L. Ed. 2d 869 (1979).

6 U.S.—Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975).

7 U.S.—Lynch v. Baxley, 386 F. Supp. 378 (M.D. Ala. 1974).

8 U.S.—Bell v. Wayne County General Hospital At Eloise, 384 F. Supp. 1085 (E.D. Mich. 1974).

9 U.S.—Coll v. Hyland, 411 F. Supp. 905 (D.N.J. 1976).

16D C.J.S. Constitutional Law § 2168

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

3. Mentally Ill Persons

§ 2168. Due process issues of procedure and evidence in matters involving mentally ill persons—Standard of proof

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

There is a difference of opinion as to whether, in order to satisfy due process requirements, the evidence on which the commitment of a mentally ill person is based should be tested by the "preponderance of the evidence" standard or must meet the "clear and convincing" standard of proof.

According to some courts, the preponderance of evidence standard applies when the government seeks to prove the lawfulness of a proposed conservatee's detention under temporary conservatorship,[1] or where the State attempts to commit an individual found not guilty by reason of insanity,[2] or in determining "dangerousness" under a provision of a statute requiring an alleged mentally ill individual to remain in custody for up to 90 days to determine whether involuntary treatment would be appropriate.[3] According to other courts, however, to satisfy due process requirements, the evidence on which the commitment of a mentally ill person is based cannot be tested by the "preponderance of the evidence" standard[4] but must satisfy at least the "clear and convincing" standard of proof;[5] it is not required to meet the "beyond a reasonable doubt" standard.[6] While the "clear and

convincing" criterion meets the constitutional minimum, states remain free to adhere to the "beyond a reasonable doubt" standard although the use of the latter in civil commitment proceedings has been regarded as inappropriate.[7]

Footnotes

1 Cal.—In re Lois M., 214 Cal. App. 3d 1036, 263 Cal. Rptr. 100 (1st Dist. 1989).

2 N.J.—Matter of Commitment of J.L.J., 196 N.J. Super. 34, 481 A.2d 563 (App. Div. 1984).

3 N.H.—State v. Lavoie, 155 N.H. 477, 924 A.2d 370 (2007).

4 U.S.—Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).
Va.—Shivaee v. Com., 270 Va. 112, 613 S.E.2d 570 (2005).

5 U.S.—Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).
Wash.—State v. Bao Dinh Dang, 178 Wash. 2d 868, 312 P.3d 30 (2013).

6 U.S.—Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

7 U.S.—Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).

16D C.J.S. Constitutional Law § 2169

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

4. Developmentally Disabled Persons

§ 2169. Due process issues pertaining to developmentally disabled persons generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4340

The commitment of developmentally disabled persons must comply with due process requirements.

The Due Process Clauses of the United States Constitution bar the involuntary commitment of a developmentally disabled person in the absence of a state interest that justifies the commitment,[1] and a statute that governs involuntary hospitalizations of developmentally disabled persons is valid if it provides procedures and evidentiary standards that protect an individual's constitutionally protected liberty interest.[2]

Due process safeguards are applicable to the commitments of developmentally disabled persons,[3] including a hearing at which the person subject to commitment has a right to be present,[4] representation by counsel,[5] and the right to be advised of applicable constitutional rights.[6] The hearing need not be a judicial hearing, however.[7]

Mentally retarded persons involuntarily committed to a state institution have substantive liberty rights, under the Due Process Clause of the Fourteenth Amendment, to adequate food, shelter, clothing,[8] and medical care.[9] The "medical care" in such

a situation includes life-preserving or emergency care as well as regular and preventive treatment for ordinary or chronic ailments.[10] Such individuals also have a right to safe conditions,[11] to freedom from bodily restraint[12] or attack,[13] and to minimally adequate or reasonable training to insure the retarded persons' safety and freedom from undue restraint.[14]

However, a voluntarily committed resident of a state institution does not have a due process right to safe conditions.[15]

Sterilization.

Sterilization of allegedly mentally incompetent persons must be based upon clear and convincing evidence that such persons could not care for and support a child.[16]

Footnotes

1 Ill.—People v. Reliford, 65 Ill. App. 3d 177, 21 Ill. Dec. 778, 382 N.E.2d 72 (1st Dist. 1978).

2 Neb.—In re C.R., 281 Neb. 75, 793 N.W.2d 330 (2011).

3 Cal.—In re Hop, 29 Cal. 3d 82, 171 Cal. Rptr. 721, 623 P.2d 282 (1981).

4 Cal.—In re Watson, 91 Cal. App. 3d 455, 154 Cal. Rptr. 151 (4th Dist. 1979).

5 U.S.—Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

6 U.S.—Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968).

7 U.S.—Doe by Doe v. Austin, 848 F.2d 1386 (6th Cir. 1988).

8 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Lelsz v. Kavanagh, 673 F. Supp. 828, 43 Ed. Law Rep. 85 (N.D. Tex. 1987).

9 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); U.S. v. Com. of Pa., 902 F. Supp. 565 (W.D. Pa. 1995), judgment aff'd, 96 F.3d 1436 (3d Cir. 1996).

10 U.S.—Lelsz v. Kavanagh, 673 F. Supp. 828, 43 Ed. Law Rep. 85 (N.D. Tex. 1987).

11 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Bernstein v. Lower Moreland Tp., 603 F. Supp. 907 (E.D. Pa. 1985).

12 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Armstead v. Pingree, 629 F. Supp. 273 (M.D. Fla. 1986).
Ohio—In re Blackman, 90 Ohio App. 3d 10, 627 N.E.2d 1049 (5th Dist. Tuscarawas County 1993).

13 U.S.—Bernstein v. Lower Moreland Tp., 603 F. Supp. 907 (E.D. Pa. 1985).

14 U.S.—Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Armstead v. Pingree, 629 F. Supp. 273 (M.D. Fla. 1986).
Ohio—In re Blackman, 90 Ohio App. 3d 10, 627 N.E.2d 1049 (5th Dist. Tuscarawas County 1993).

15 U.S.—Jordan v. State of Tenn., 738 F. Supp. 258 (M.D. Tenn. 1990).

16 Ga.—Motes v. Hall County Dept. of Family and Children Services, 251 Ga. 373, 306 S.E.2d 260 (1983).

16D C.J.S. Constitutional Law § 2170

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

4. Developmentally Disabled Persons

§ 2170. Due process issues pertaining to developmentally disabled minors

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

The involuntary commitment of a developmentally disabled minor must accord with due process of law.

The involuntary commitment of a developmentally disabled minor, involving as it does a massive curtailment of liberty and stigmatization, must be justified by some permissible governmental interest,[1] and federal and state due process protections prevent the involuntary institutionalization of a minor solely on the ground of mental disability.[2]

Moreover, the need for the commitment of a developmentally disabled minor must be determined by a neutral fact finder in view of the risk of error which is inherent in a parental decision to institutionalize a minor[3] and in view of the possible conflicts of interest between a developmentally disabled minor and a parent.[4] Similarly, the need to continue the commitment of a developmentally disabled minor must be reviewed periodically through an independent procedure.[5]

Footnotes

1 U.S.—Gary W. v. State of La., 437 F. Supp. 1209 (E.D. La. 1976).

2 Ill.—People v. Reliford, 65 Ill. App. 3d 177, 21 Ill. Dec. 778, 382 N.E.2d 72 (1st Dist. 1978).

3 U.S.—Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979).

4 U.S.—Saville v. Treadway, 404 F. Supp. 430 (M.D. Tenn. 1974).

5 U.S.—Secretary of Public Welfare of Pennsylvania v. Institutionalized Juveniles, 442 U.S. 640, 99 S. Ct. 2523, 61 L. Ed. 2d 142 (1979).

End of Document

16D C.J.S. Constitutional Law § 2171

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

5. Persons with Addictions

§ 2171. Due process issues pertaining to addicted persons generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

Persons addicted to alcohol or drugs may be confined involuntarily for treatment but must be accorded procedural due process.

Persons addicted to narcotics may be involuntarily confined for the purposes of treatment,[1] but persons suspected of being addicts may not be detained without being given an opportunity to be heard.[2] Moreover, because civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection,[3] and the involuntary commitment to an alcohol detoxification center can stigmatize an individual generating adverse social consequences,[4] the due process standards for civil commitments for the treatment of alcoholism do not differ from those for civil commitments for the treatment of mental illness.[5] Even so, a judicial hearing as a prerequisite to the commitment of a clearly dangerous intoxicated person would hinder the government's efforts in controlling alcohol abuse without providing additional procedural safeguards and thus is not required as a matter of due process.[6] Due process demands only that a neutral fact finder independently determine that the statutory requirements for commitment of a clearly dangerous intoxicated individual are satisfied.[7]

Similar due process safeguards apply to commitment of a minor to a center for the treatment of substance abuse problems.[8]

While the constitutionality of committing persons who are in imminent danger of becoming addicted has been validated,[9] it has also been declared that persons habituated to the excessive use of drugs or alcohol may not, solely on the ground of such habituation, be deprived of their liberty by nonconsensual hospitalization,[10] and a statute authorizing the involuntary commitment of a person "incapacitated by alcohol" violates due process where the standard of dangerousness contained in the statute does not provide a constitutional basis for detention.[11] Nevertheless, the involuntary confinement of a detainee at a detoxification facility overnight does not constitute confinement for the status of being alcoholic in violation of due process but rather constitutes confinement for the conduct of being drunk in a public place.[12]

Commitment of minors.

Where a statute allows a parent or guardian to petition for commitment of minor to involuntary drug and alcohol treatment services, the minor enjoys a liberty interest protected by due process concerns that are implicated. A minor's constitutional rights are generally limited, however, by the state's special interests in guiding children's lives and by traditional state deference to parental autonomy in child rearing. Involuntary commitment for therapeutic purposes does not need to mirror the procedures for a criminal trial to pass a due process challenge.[13]

Footnotes

1 U.S.—Robinson v. California, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

2 N.Y.—Narcotic Addiction Control Commission v. James, 22 N.Y.2d 545, 293 N.Y.S.2d 531, 240 N.E.2d 29 (1968).

3 Colo.—Carberry v. Adams County Task Force On Alcoholism, 672 P.2d 206 (Colo. 1983).
Wash.—Mays v. State, 116 Wash. App. 864, 68 P.3d 1114 (Div. 1 2003).

4 Colo.—Carberry v. Adams County Task Force On Alcoholism, 672 P.2d 206 (Colo. 1983).

5 Wash.—Mays v. State, 116 Wash. App. 864, 68 P.3d 1114 (Div. 1 2003).

6 Colo.—Carberry v. Adams County Task Force On Alcoholism, 672 P.2d 206 (Colo. 1983).

7 Colo.—Carberry v. Adams County Task Force On Alcoholism, 672 P.2d 206 (Colo. 1983).

8 Pa.—In re F.C. III, 607 Pa. 45, 2 A.3d 1201 (2010).

9 Cal.—People v. Victor, 62 Cal. 2d 280, 42 Cal. Rptr. 199, 398 P.2d 391 (1965).
Statute governing emergency commitment of alcoholics
U.S.—Donahue v. Rhode Island Dept. of Mental Health, Retardation and Hospitals By and Through Romeo, 632 F. Supp. 1456 (D.R.I. 1986).

10 U.S.—Suzuki v. Quisenberry, 411 F. Supp. 1113 (D. Haw. 1976).

11 Wash.—Recovery Northwest v. Thorslund, 70 Wash. App. 146, 851 P.2d 1259 (Div. 1 1993).

12 U.S.—Halvorsen v. Baird, 146 F.3d 680, 50 Fed. R. Evid. Serv. 338 (9th Cir. 1998).

13 Pa.—In re F.C. III, 607 Pa. 45, 2 A.3d 1201 (2010).

16D C.J.S. Constitutional Law § 2172

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

5. Persons with Addictions

§ 2172. Due process considerations pertaining to treatment of persons with addictions in lieu of imprisonment or prosecution

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4335 to 4348, 4784, 4785

A statute providing for treatment in lieu of imprisonment of a drug addict convicted of a crime creates a protected liberty interest in the defendant which requires that procedural due process be accorded the defendant before the court may terminate supervision.

A statute providing for treatment in lieu of imprisonment of a drug addict convicted of a crime creates a protected liberty interest in the defendant placed under the supervision of the licensed treatment program which requires that procedural due process be accorded the defendant before the court may terminate supervision.[1] In such a situation, the defendant is entitled to written notice of the reasons the defendant cannot be further treated, the opportunity to be heard and to present witnesses, disclosure of evidence against the defendant, and the right to confront and cross-examine adverse witnesses.[2]

A defendant who asserts an eligibility for drug or alcohol treatment in lieu of prosecution, however, is not denied due process by the fact that the state mental health agency has unlimited authority to deny admission to the treatment program in lieu of prosecution.[3]

Footnotes

1 Ill.—People v. Beckler, 121 Ill. App. 3d 436, 76 Ill. Dec. 757, 459 N.E.2d 672 (2d Dist. 1984).

2 Ill.—People v. Beckler, 121 Ill. App. 3d 436, 76 Ill. Dec. 757, 459 N.E.2d 672 (2d Dist. 1984).

3 Ind.—Weatherley v. State, 593 N.E.2d 1239 (Ind. Ct. App. 1992).

16D C.J.S. Constitutional Law § 2173

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

6. Landlords and Tenants

§ 2173. Due process considerations in landlord and tenant matters, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4080 to 4083, 4102, 4112

The due process application extends to landlords and tenants, both of whom may not be deprived of their property rights and interests without being afforded procedural due process.

A landlord generally may not be deprived of property rights or interests without due process of law,[1] and this includes a right to notice and a hearing before there is a deprivation of such rights or interests.[2] An owner is required to establish an actual injury in order to bring a substantive due process claim for a deprivation of livelihood based on government action.[3]

Tenants, including tenants of public housing, must be afforded due process before being deprived of property rights.[4] Generally, tenants in public housing or housing at which the landlord accepts substantial benefits from the various branches of government are entitled to even a greater degree of due process protection.[5] Thus, a rule of a housing authority forbidding tenants from living with any person of the opposite sex unrelated by blood, marriage, or adoption denies due process.[6]

To be constitutionally protected, a tenant's interest must be more than a subjective expectancy.[7] It must rise to the status of a property interest,[8] and a mere unilateral expectation is not protectable under due process.[9]

Admissions to publicly aided housing projects are subject to due process requirements,[10] and due process simply requires that the selection of applicants be conducted according to ascertainable standards and in a reasonable manner.[11] A tenant has a protected property interest in a housing subsidy and is entitled to due process of law before it can be terminated.[12]

The interest of tenants of government subsidized housing in not having their rents raised[13] is a property interest cognizable under due process. Accordingly, government subsidized tenants in housing are entitled to notice of a proposed rent increase[14] and to an opportunity to make written objections thereto as well as to be furnished with a concise statement of the reasons for the increase.[15] However, a full-dress hearing, before rents may be increased, may not be necessary[16] although in certain cases a hearing may be required.[17]

Tenants in a nonsubsidized housing project are not entitled by the Due Process Clause to a hearing prior to approval of a rent increase, nor are they entitled to a more limited right to be notified of, and to comment on, any proposed rental ceiling increases.[18] A hearing is also not a due process requirement in a claim by a public housing tenant for repairs of housing defects.[19]

The interests of tenants in keeping rents at levels permitted under rent control and rent stabilization law is a protectable property interest,[20] and, while no particular procedure is required of a rent control board, it must comport with due process.[21]

Various statutes, ordinances, and regulations involving the landlord and tenant relationship have been found not to violate due process,[22] including statutes and ordinances, and regulations which provide for rent limitations,[23] bargaining power for tenants,[24] statutes providing for the forfeiture of a security deposit under certain conditions,[25] and statutes prohibiting escalation clauses in leases.[26] Moreover, rent withholding statutes which provide for the termination of rent where a dwelling is classified as unfit for human habitation have been found not to violate due process.[27]

An order compelling tenants to pay past due and future rents directly to a receiver, in lieu of a landlord, will not deprive tenants of a property or liberty interest without due process.[28]

CUMULATIVE SUPPLEMENT

Cases:

Flyer provided by local housing authority to beneficiaries of Section 8 housing vouchers was inadequate on its face to protect beneficiaries' property right in housing benefits that continued in existence for at least one year after beneficiary was advised that benefits were to be decreased, and thus beneficiaries established second *Mathews* factor for determining whether procedures provided were sufficient under Due Process Clause; flyer only stated that housing authority lowered payment standards and would not apply new standards until beneficiary's next regular reexamination, but did not explain what a payment standard was or how lowering it would effect beneficiary's benefits or portion of rent beneficiary was required to pay, flyer did not include information for beneficiaries to obtain further information, and other public meetings and training sessions regarding voucher program were insufficient to inform beneficiaries of what the payment standard was and how it impacted benefits. U.S.C.A. Const.Amend. 14; United States Housing Act of 1937, § 8, 42 U.S.C.A. § 1437f; 24 C.F.R. § 982.505(c)(3). Nozzi v. Housing Authority of City of Los Angeles, 806 F.3d 1178 (9th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 D.C.—Cobb v. Bynum, 387 A.2d 1095 (D.C. 1978).

2 N.Y.—Builders' Council of Suburban New York, Inc. v. City of Yonkers, 106 Misc. 2d 700, 434 N.Y.S.2d 566 (Sup 1979), judgment aff'd, 79 A.D.2d 696, 434 N.Y.S.2d 450 (2d Dep't 1980).

3 Or.—Lincoln Loan Co. v. City of Portland, 158 Or. App. 574, 976 P.2d 60 (1999).

4 U.S.—Knaefler v. Mack, 680 F.2d 671 (9th Cir. 1982).

5 Conn.—Henry Knox Sherrill Corp. v. Randall, 33 Conn. Supp. 15, 358 A.2d 154 (C.P. 1975).

6 Cal.—Atkisson v. Kern County Housing Authority, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (5th Dist. 1976).

7 U.S.—Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981).

8 U.S.—Swann v. Gastonia Housing Authority, 675 F.2d 1342 (4th Cir. 1982).

9 Colo.—Hurricane v. Kanover, Ltd., 651 P.2d 1218 (Colo. 1982).

10 U.S.—Holmes v. New York City Housing Authority, 398 F.2d 262 (2d Cir. 1968).

11 U.S.—Daubner v. Harris, 514 F. Supp. 856 (S.D. N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir. 1982) and aff'd, 688 F.2d 815 (2d Cir. 1982).

12 Mass.—Rivas v. Chelsea Housing Authority, 464 Mass. 329, 982 N.E.2d 1147 (2013).

13 U.S.—Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974).

14 U.S.—Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483 (9th Cir. 1974).

A.L.R. Library

Tenants' rights, under due process clause of Federal Constitution, to notice and hearing prior to imposition of higher rents or additional service charges for government-owned or government-subsidized housing, 28 A.L.R. Fed. 739.

15 U.S.—Gramercy Spire Tenants' Ass'n v. Harris, 490 F. Supp. 1219 (S.D. N.Y. 1980).

16 U.S.—Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975).

17 Haw.—Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 522 P.2d 1255 (1974).

18 U.S.—Ellis v. U.S. Dept. of Housing and Urban Development, 551 F.2d 13 (3d Cir. 1977).

19 U.S.—Owens v. Hills, 450 F. Supp. 218 (N.D. Ill. 1978).

20 U.S.—Sidberry v. Koch, 539 F. Supp. 413, 35 Fed. R. Serv. 2d 1154 (S.D. N.Y. 1982).

21 N.J.—Mahoney v. Hoboken Rent Leveling Bd., 178 N.J. Super. 51, 427 A.2d 1138 (Law Div. 1981).

22 Or.—Marquam Inv. Corp. v. Beers, 47 Or. App. 711, 615 P.2d 1064 (1980).

23 Ohio—Joseph Bros. Co. v. Brown, 65 Ohio App. 2d 43, 19 Ohio Op. 3d 31, 415 N.E.2d 987 (6th Dist. Lucas County 1979).

24 U.S.—Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987).

25 Kan.—Clark v. Walker, 225 Kan. 359, 590 P.2d 1043 (1979).

26 U.S.—Schlytter v. Baker, 580 F.2d 848 (5th Cir. 1978).

27 Pa.—DePaul v. Kauffman, 441 Pa. 386, 272 A.2d 500, 40 A.L.R.3d 810 (1971).

28 N.Y.—Esquilin v. Jain, 217 A.D.2d 571, 628 N.Y.S.2d 822 (2d Dep't 1995).

End of Document

16D C.J.S. Constitutional Law § 2174

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

F. Particular Persons Affected

6. Landlords and Tenants

§ 2174. Due process issues pertaining to termination of property leases

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4080 to 4083, 4102, 4112

A tenant's interest in a lease is considered a property right that the tenant may not be deprived of without due process. Eviction proceedings should provide tenants with due process protections, such as notice and hearing.

A tenant's interest in a lease is considered a property right which the tenant may not be deprived of without due process.[1] Due process requires notice and a hearing prior to eviction.[2] Tenants in rent-controlled property, however, do not have a constitutionally protected property interest in the form of a right to renew their leases indefinitely.[3]

As a general rule, eviction proceedings should provide due process protections.[4] So, in an eviction proceeding, a tenant is entitled to notice and hearing which should meet the requirements of due process of law, and there is no denial of due process where there is a compliance with such requirements.[5] A statute providing for service of process in a summary eviction proceeding by personal delivery, delivery to and personally leaving a copy with a person of suitable age and discretion who resides at or is employed at the property sought to be recovered or by affixing a copy on a conspicuous part of the property sought to

be recovered, together with a requirement of mailing a copy of notice in the latter two instances, complies with due process requirements.[6]

In cases involving government subsidized public housing, the termination of a tenancy is characterized as "state action,"[7] and tenants have a "property interest" in their tenancy even at the expiration of the lease term,[8] which under due process can only be terminated for good cause.[9] As otherwise stated, a tenant in a publicly subsidized housing project is entitled to due process protection before an eviction determination is made,[10] and due process requires timely and adequate notice detailing the reasons for the termination,[11] a hearing,[12] an opportunity on the part of the tenant to confront and cross-examine adverse witnesses,[13] the right to be represented by counsel to safeguard the tenant's interests,[14] the right to a decision based on the evidence adduced at a hearing in which the reasons for the decision and the evidence relied on are set forth,[15] and the right to an impartial decisionmaker.[16] Even so, to establish a denial of substantive due process an evicted tenant under a federally subsidized lease must demonstrate that the landlord's actions deprived the tenant of property for an irrational or invidious purpose.[17]

Activity by guest or family member.

A statute authorizing a public housing authority to evict a tenant whose family member or guest engages in drug-related criminal activity on or near public housing premises, even if the tenant is ignorant of such activity, does not violate the tenant's due process or freedom of association rights where the statute is rationally related to legitimate government objectives.[18] Similarly, terminating a public housing lease based on the violent acts committed by a tenant's adult child does not violate due process by punishing the tenant for the actions of the child since the tenant is evicted for failing to assure that guests do not disturb or endanger others in the community.[19]

Forcible entry and detainer.

A forcible entry and detainer statute does not deprive landlords of a property right without due process of law absent a showing that it affords an unconstitutionally slow or onerous procedure.[20]

Footnotes

1 Iowa—Lewis v. Jaeger, 818 N.W.2d 165 (Iowa 2012).

2 U.S.—Cochran v. Folger, 740 F. Supp. 2d 923 (E.D. Ky. 2010), aff'd in part, 656 F.3d 300 (6th Cir. 2011).

3 U.S.—Keeler v. Joy, 489 F. Supp. 568 (E.D. N.Y. 1980), decision aff'd, 641 F.2d 1044 (2d Cir. 1981).

4 N.Y.—Scarborough v. Elmira Housing Authority, 78 Misc. 2d 885, 358 N.Y.S.2d 861 (Sup 1974).

5 U.S.—Jeffries v. Georgia Residential Finance Authority, 503 F. Supp. 610 (N.D. Ga. 1980), adhered to, 90 F.R.D. 62, 31 Fed. R. Serv. 2d 757 (N.D. Ga. 1981) and judgment aff'd, 678 F.2d 919, 34 Fed. R. Serv. 2d 500 (11th Cir. 1982).

6 U.S.—Velazquez v. Thompson, 451 F.2d 202 (2d Cir. 1971).
As to special or summary proceedings generally and due process of law requirement, see § 1920.

7 U.S.—Swann v. Gastonia Housing Authority, 675 F.2d 1342 (4th Cir. 1982).

8 U.S.—Jeffries v. Georgia Residential Finance Authority, 678 F.2d 919, 34 Fed. R. Serv. 2d 500 (11th Cir. 1982).

9 U.S.—Swann v. Gastonia Housing Authority, 675 F.2d 1342 (4th Cir. 1982).

10 Ga.—Smith v. Hendrix, 162 Ga. App. 299, 290 S.E.2d 504 (1982).

11 Conn.—Housing Authority of City of Hartford v. McKenzie, 36 Conn. Supp. 515, 412 A.2d 1143 (Super. Ct. 1979).

12 U.S.—Short v. Fulton Redevelopment Co., Inc., 390 F. Supp. 517 (S.D. N.Y. 1975), on reconsideration, 398 F. Supp. 1234 (S.D. N.Y. 1975).

13 Conn.—Housing Authority of City of Hartford v. McKenzie, 36 Conn. Supp. 515, 412 A.2d 1143 (Super. Ct. 1979).

14 N.Y.—Hall v. Municipal Housing Authority for City of Yonkers, 57 A.D.2d 894, 394 N.Y.S.2d 447 (2d Dep't 1977).

15 Conn.—Housing Authority of City of Hartford v. McKenzie, 36 Conn. Supp. 515, 412 A.2d 1143 (Super. Ct. 1979).

16 U.S.—Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974).

17 Ill.—American Apartment Management Co., Inc. v. Phillips, 274 Ill. App. 3d 556, 210 Ill. Dec. 639, 653 N.E.2d 834 (1st Dist. 1995).

18 U.S.—Burton v. Tampa Housing Authority, 271 F.3d 1274 (11th Cir. 2001).

19 U.S.—Chavez v. Housing Authority of City of El Paso, 973 F.2d 1245 (5th Cir. 1992).

20 U.S.—Chicago Bd. of Realtors, Inc. v. City of Chicago, 819 F.2d 732 (7th Cir. 1987).

End of Document

16D C.J.S. Constitutional Law VIII XXII G Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Due Process
A.L.R. Index, Fourteenth Amendment
West's A.L.R. Digest, Constitutional Law 3929, 4055, 4056, 4191

End of Document

16D C.J.S. Constitutional Law § 2175

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

1. Political Subdivisions, in General

§ 2175. Political subdivisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3929, 4055, 4056

The due process guaranty does not ordinarily restrain the state in its control of its governmental agencies and political subdivisions, and since the requirement is generally a limitation on the state itself, it is not available to the state or to its agencies or political subdivisions.

The power of a state in control of its own governmental agencies and political subdivisions is unrestrained by the requirement of due process of law.[1] Moreover, since the requirement is generally a limitation on the state itself, it is not available to the state[2] or to its agencies or political subdivisions.[3] Agencies or political subdivisions of a state cannot be viewed as persons within due process clauses.[4] Thus, counties,[5] municipalities,[6] cities,[7] and school districts[8] are not persons within such clauses although there is authority whereby a municipal corporation has been considered a person within the meaning of the constitutional guaranty.[9]

Footnotes

1 U.S.—Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926).
Ill.—People v. Valentine, 50 Ill. App. 3d 447, 8 Ill. Dec. 696, 365 N.E.2d 1082 (5th Dist. 1977).
N.Y.—Cayuga County v. McHugh, 4 N.Y.2d 609, 176 N.Y.S.2d 643, 152 N.E.2d 73 (1958).
Control of counties and other political subdivisions unrestrained by due process
S.D.—State ex rel. Aurora County v. Circuit Court, Fifth Judicial Circuit, Brown County, 268 N.W.2d 607 (S.D. 1978).

2 U.S.—South Dakota v. U.S. Dept. of Interior, 665 F.3d 986 (8th Cir. 2012); National Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013), judgment aff'd, 730 F.3d 208 (3d Cir. 2013).
Okla.—Carl v. Board of Regents of University of Oklahoma, 1978 OK 49, 577 P.2d 912 (Okla. 1978).
Or.—State v. Woodall, 259 Or. App. 67, 313 P.3d 298 (2013), review denied, 354 Or. 735, 320 P.3d 567 (2014).

3 Ill.—Department of Cent. Management Services/Illinois Commerce Com'n v. Illinois Labor Relations Bd., 406 Ill. App. 3d 766, 348 Ill. Dec. 226, 943 N.E.2d 1136 (4th Dist. 2010).
Miss.—Cities of Oxford, Carthage, Louisville, Starkville and Tupelo v. Northeast Mississippi Elec. Power Ass'n, 704 So. 2d 59 (Miss. 1997).
Pa.—Com., Office of Atty. Gen., ex rel. Kelly v. Packer Tp., 49 A.3d 495 (Pa. Commw. Ct. 2012).

4 Ark.—Arkansas State Hospital v. Goslee, 274 Ark. 168, 623 S.W.2d 513 (1981).
Ill.—Department of Cent. Management Services/Illinois Commerce Com'n v. Illinois Labor Relations Bd., 406 Ill. App. 3d 766, 348 Ill. Dec. 226, 943 N.E.2d 1136 (4th Dist. 2010).
Miss.—Tally v. Board of Sup'rs of Smith County, 307 So. 2d 553 (Miss. 1975).

5 Ga.—Lumpkin County v. Georgia Insurers Insolvency Pool, 292 Ga. 76, 734 S.E.2d 880 (2012).
Mo.—Jackson County v. State, 207 S.W.3d 608 (Mo. 2006).
Neb.—Schropp Industries, Inc. v. Washington County Attorney's Office, 281 Neb. 152, 794 N.W.2d 685 (2011).

6 U.S.—Board of Educ. of Shelby County, Tenn. v. Memphis City Bd. of Educ., 911 F. Supp. 2d 631, 293 Ed. Law Rep. 272 (W.D. Tenn. 2012).
Ill.—People v. Valentine, 50 Ill. App. 3d 447, 8 Ill. Dec. 696, 365 N.E.2d 1082 (5th Dist. 1977).
La.—Penny v. Bowden, 199 So. 2d 345 (La. Ct. App. 3d Cir. 1967).

7 U.S.—City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157 (D.D.C. 1980).
Minn.—City of Marshall v. Public Emp. Retirement Ass'n, 310 Minn. 489, 246 N.W.2d 572 (1976).
Ohio—Hamilton v. Fairfield Twp., 112 Ohio App. 3d 255, 678 N.E.2d 599 (12th Dist. Butler County 1996).

8 Minn.—Independent School Dist. No. 281 v. Minnesota Dept. of Educ., 743 N.W.2d 315, 228 Ed. Law Rep. 458 (Minn. Ct. App. 2008).
Mo.—State ex rel. Brentwood School Dist. v. State Tax Commission, 589 S.W.2d 613 (Mo. 1979).
Charter schools
Community schools, that is, "charter schools," were political subdivisions of the state and thus were barred from asserting a due process claim against the state in federal court; state statutes defined community schools as subdivisions, the state's collective bargaining statute enumerated community schools as political subdivisions, and community schools bore the characteristics of political subdivisions, including the fact that the state could withdraw powers and privileges from them as it saw fit.
U.S.—Greater Heights Academy v. Zelman, 522 F.3d 678, 231 Ed. Law Rep. 570 (6th Cir. 2008) (applying Ohio law).
As to the creation, alteration, and regulation of school districts, generally, see § 2180.

9 U.S.—River Vale Tp. v. Town of Orangetown, 403 F.2d 684 (2d Cir. 1968).

End of Document

16D C.J.S. Constitutional Law § 2176

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

1. Political Subdivisions, in General

§ 2176. Distinction between governmental and proprietary capacities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3929, 4055, 4056

A distinction is sometimes made between the governmental and proprietary capacities of state agencies and subdivisions, it being only in the former case that the requirement of due process is found not to be applicable.

A distinction is sometimes made between the governmental and proprietary capacities of state agencies and subdivisions, it being only in the former case that the requirement of due process is found not to be applicable.[1] Accordingly, the power of the state to control and regulate the property rights of municipal corporations, or of quasi-municipal corporations, is not subject to the restrictions of the due process of law guaranties, insofar as the property is held and used by such corporations, or agencies of the government, in their governmental or public capacities.[2] This has even been found to be true of property held in furtherance of proprietary functions[3] although it has also been considered that municipal or quasi-municipal corporations may be subject to such restrictions with respect to property rights held and used by them in their proprietary or private capacities.[4]

Footnotes

1 Mont.—State ex rel. Kern v. Arnold, 100 Mont. 346, 49 P.2d 976, 100 A.L.R. 1071 (1935).
Vt.—Jones v. Vermont Asbestos Corp., 108 Vt. 79, 182 A. 291 (1936).

2 U.S.—Risty v. Chicago, R.I. & P. Ry. Co., 270 U.S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926).
La.—Penny v. Bowden, 199 So. 2d 345 (La. Ct. App. 3d Cir. 1967).
Ohio—City of Cincinnati v. Rosi, 92 Ohio App. 8, 49 Ohio Op. 186, 109 N.E.2d 290 (1st Dist. Hamilton County 1952).
Wis.—Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N.W.2d 424 (1951).

3 Minn.—Monaghan v. Armatage, 218 Minn. 108, 15 N.W.2d 241 (1944).

4 U.S.—City of Trenton v. State of New Jersey, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923).
Wis.—Madison Metropolitan Sewerage Dist. v. Committee on Water Pollution, 260 Wis. 229, 50 N.W.2d 424 (1951).

End of Document

16D C.J.S. Constitutional Law § 2177

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2177. Creation, alternation, and regulation of political subdivisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3929, 4055, 4056

The due process of law guaranty is generally not violated with respect to either the subdivision or of private owners therein by action of the state or of one of its agencies under statutes providing for the creation, alteration, and regulation of various political subdivisions.

The due process of law guaranty is generally not violated with respect to either the subdivision or of private owners therein by action of the state or of one of its agencies under statutes providing for the creation, alteration, and regulation of various political subdivisions.[1] Thus, the legislative act of creating, altering, or developing the boundaries of municipalities is not subject to the state constitutional requirements of due process despite its injurious consequences.[2]

The due process guaranty is likewise not violated in this respect by statutes providing for the creation, alteration, and regulation of an airport authority or commission;[3] a drainage, reclamation, or irrigation district;[4] a fire protection district;[5] a highway or road district;[6] a hospital district;[7] a park district;[8] a public utility district;[9] a sewer district;[10] or a water district.[11]

On the other hand, statutes providing for the creation, alteration, and regulation of various political subdivisions should not be so indefinite, vague, and uncertain as to deny due process of law.[12] It has also been found that a municipality generally cannot be required to impose a burden on its utility facilities or on the city itself by providing services to persons who are outside its corporate limits and beyond its taxing powers and that to compel an extension of such facilities at a loss would violate due process.[13]

Regulations for officers.

The legislature may make regulations for the officers of state subdivisions, in the discharge of their duties, without violating the due process guaranty,[14] even to the extent of requiring a city to perform acts through its officers and employees against its corporate will.[15]

Municipal interference with franchise.

While a franchise is a valuable property right which cannot be abrogated or taken without due process,[16] there is no constitutionally protected property interest in a franchise renewal so that a municipality's refusal to grant a franchise renewal does not constitute a deprivation of due process.[17] Moreover, no constitutional deprivation or taking from a nonexclusive franchisee, as would be protected by due process requirements, results when the franchisor grants similar franchises to other parties.[18]

Footnotes

1 U.S.—Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 43 S. Ct. 684, 67 L. Ed. 1167 (1923).
Miss.—Gambrill v. Gulf States Creosoting Co., 216 Miss. 505, 62 So. 2d 772 (1953).

2 S.D.—Kraft v. Meade County ex rel. Bd. of County Com'rs, 2006 SD 113, 726 N.W.2d 237 (S.D. 2006).

3 Ill.—People ex rel. Curren v. Wood, 391 Ill. 237, 62 N.E.2d 809, 161 A.L.R. 718 (1945).
Minn.—Monaghan v. Armatage, 218 Minn. 108, 15 N.W.2d 241 (1944).

4 Kan.—Kowing v. Douglas County Kaw Drainage Dist., 167 Kan. 387, 207 P.2d 457 (1949).
La.—Bahry v. West Ascension Consol. Drainage Dist., 218 La. 1028, 51 So. 2d 614 (1951).
Mo.—Farmers Drainage Dist. of Ray County v. Sinclair Refining Co., 255 S.W.2d 745 (Mo. 1953).

5 Ill.—People ex rel. Armstrong v. Huggins, 407 Ill. 157, 94 N.E.2d 863 (1950).
Mo.—State ex rel. Fire Dist. of Lemay v. Smith, 353 Mo. 807, 184 S.W.2d 593 (1945).

6 Cal.—Joint Highway Dist. No. 13 v. Hinman, 220 Cal. 578, 32 P.2d 144 (1934).
Mo.—State ex rel. Little Prairie Special Road Dist. of Pemiscot County v. Thompson, 315 Mo. 56, 285 S.W. 57 (1926).

7 Ill.—People ex rel. Royal v. Cain, 410 Ill. 39, 101 N.E.2d 74 (1951).

8 Ill.—People ex rel. Honefenger v. Burris, 408 Ill. 68, 95 N.E.2d 882 (1950).

9 Cal.—In re Bonds of Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004 (1925).
Or.—Petition of Board of Directors of Tillamook People's Utility Dist., 160 Or. 530, 86 P.2d 460 (1939).

10 U.S.—Reppel v. Board of Liquidation, 11 F. Supp. 799 (E.D. La. 1935).
Mo.—State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 337 Mo. 855, 87 S.W.2d 147 (1935).

11 Idaho—In re Idaho Dept. of Water Resources Amended Final Order Creating Water Dist. No. 170, 148 Idaho 200, 220 P.3d 318 (2009).
Neb.—Brasier v. City of Lincoln, 159 Neb. 12, 65 N.W.2d 213 (1954).
Wash.—Rood v. Water Dist. No. 24 of King County, 183 Wash. 258, 48 P.2d 584 (1935).
Statute of limitations

A statute of limitations on challenges to the creation and extension of a water district did not violate due process since it would be improvident and potentially damaging to the town's financial stability to permit taxpayers to revisit every year the issue of whether parcels were benefited by the water district.

N.Y.—Niagara Mohawk Power Corp. v. Town of Bethlehem, 16 A.D.3d 888, 792 N.Y.S.2d 209 (3d Dep't 2005), order aff'd, 6 N.Y.3d 744, 810 N.Y.S.2d 399, 843 N.E.2d 1138 (2005).

12 Ill.—Paepcke v. Public Bldg. Commission of Chicago, 46 Ill. 2d 330, 263 N.E.2d 11 (1970).

Initiative unconstitutionally vague

A county initiative, providing that no act to approve any new or expanded jail, hazardous waste landfill, or civilian airport project will be valid and effective unless also subsequently ratified by a two-thirds vote of the voters voting at a county general election, was unconstitutionally vague on its face in violation of due process.

Cal.—Citizens for Jobs and the Economy v. County of Orange, 94 Cal. App. 4th 1311, 115 Cal. Rptr. 2d 90 (4th Dist. 2002), as modified on other grounds on denial of reh'g, (Feb. 4, 2002).

13 Md.—Bair v. Mayor and City Council of Westminster, 243 Md. 494, 221 A.2d 643 (1966).

14 U.S.—Reppel v. Board of Liquidation, 11 F. Supp. 799 (E.D. La. 1935).

Prohibiting nepotism and trading among themselves

An act creating a new board of commissioners of a county, and prohibiting nepotism and trading of members of the board between themselves and those related to them, and providing a penalty therefore, is not unconstitutional as depriving the commissioners of property without due process.

Ga.—Bradford v. Hammond, 179 Ga. 40, 175 S.E. 18 (1934).

15 Ill.—People v. Valentine, 50 Ill. App. 3d 447, 8 Ill. Dec. 696, 365 N.E.2d 1082 (5th Dist. 1977).

16 La.—Valley Elec. Membership Corp. v. Southwestern Elec. Power Co., 550 So. 2d 702 (La. Ct. App. 2d Cir. 1989), writ denied, 551 So. 2d 1341 (La. 1989) and writ denied, 551 So. 2d 1342 (La. 1989).

17 U.S.—Golden State Transit Corp. v. City of Los Angeles, 686 F.2d 758 (9th Cir. 1982).

18 La.—Acadian Ambulance Service, Inc. v. Parish of East Baton Rouge, 722 So. 2d 317 (La. Ct. App. 1st Cir. 1998), writ denied, 729 So. 2d 583 (La. 1998).

End of Document

16D C.J.S. Constitutional Law § 2178

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2178. Creation of political subdivisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056

A long-recognized attribute of state sovereignty is the state's power to create political subdivisions as a convenience in exercising its power, and a state's sovereign powers to create, abolish, and fund political subdivisions are not constrained by due process concerns.

A long-recognized attribute of state sovereignty is the state's power to create political subdivisions as a convenience in exercising its power, and a state's sovereign powers to create, abolish, and fund political subdivisions are not constrained by due process concerns.[1] When questions of public policy, convenience, and welfare, related to the creation of municipal corporations, of purely legislative cognizance, are delegated to any public body having legislative power, any action in regard thereto does not come within the due process clauses of either the state or federal constitutions. However, when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist on which the legislature has conditioned its authority, then the questions presented are of a quasi-judicial character and a hearing must be had on notice to parties to determine if such facts exist.[2] Where the legislature provides generally for the creation of a municipal corporation or district, and provides the conditions under which it may be created, it has also been found that it may without violating the due

process guaranty leave to some officer or official body the duty of determining whether the prescribed terms and conditions exist.[3]

Actions by county councils.

No denial of due process occurs by the creation of a special tax district where, although private citizens propose the tax district, the county council retains discretion in deciding whether to enact an ordinance necessary to create the district.[4] Further, a provision requiring a unanimous vote of the board of county commissioners to grant a petition to incorporate a third-class city when the area sought to be incorporated lies within five miles of an existing city does not violate the equal protection or due process clauses of the federal or state constitutions.[5]

CUMULATIVE SUPPLEMENT

Cases:

Unless prohibited by some provision in the state or federal constitutions, the General Assembly has the power to create a new political subdivision, to withdraw from a city the authority to own and operate a public water system, and to transfer the city's water system to the new political subdivision. City of Asheville v. State, 777 S.E.2d 92 (N.C. Ct. App. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Stanley v. Darlington County School Dist., 84 F.3d 707, 109 Ed. Law Rep. 1083, 35 Fed. R. Serv. 3d 644 (4th Cir. 1996).

2 Neb.—Nickel v. School Bd. of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

3 Or.—Petition of Board of Directors of Tillamook People's Utility Dist., 160 Or. 530, 86 P.2d 460 (1939).

4 U.S.—North Carolina Elec. Membership Corp. v. White, 722 F. Supp. 1314 (D.S.C. 1989).

5 Kan.—Matter of Application for Incorporation as The City of Sherwood, 241 Kan. 396, 736 P.2d 875 (1987).

16D C.J.S. Constitutional Law § 2179

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2179. Creation of political subdivisions—Elections and consent by residents

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056

The legislature can provide that, based on a petition, an election will be held to determine whether a subdistrict should be created, and that the election will bind the residents of the area, which would not deprive any person of due process of law.

The legislature, having the power to create a district by its own fiat, can provide that, based on a petition, an election will be held to determine whether a subdistrict should be created, and that the election will bind the residents of the area, which would not deprive any person of due process of law.[1] A statute requiring consent to the incorporation of an existing municipality within one and one-half miles of limits of an area containing fewer than 7,500 residents does not infringe on the fundamental right of residents of the area seeking to incorporate and does not violate equal protection or substantive due process.[2]

On the other hand, it is not a requirement of due process that laws for the formation of municipal corporations allow every person to be included or excluded according to his or her choice since such an interpretation would allow individuals to override the will of the majority.[3] It has also been found that the incorporation of a borough does not deny due process to property owners in the area, notwithstanding the uncontested ability of the owners to supply many of the services which the borough is empowered to provide.[4]

Footnotes

1 S.D.—In re Oahe Conservancy Subdistrict, 85 S.D. 443, 185 N.W.2d 682 (1971).

2 Ill.—Kaltsas v. City of North Chicago, 160 Ill. App. 3d 302, 112 Ill. Dec. 24, 513 N.E.2d 438 (2d Dist. 1987).
All residents qualified to vote for town officers allowed to vote at incorporation election
N.Y.—Gibbs v. Howell, 40 A.D.2d 322, 340 N.Y.S.2d 53 (3d Dep't 1973).

3 Ill.—People ex rel. Royal v. Cain, 410 Ill. 39, 101 N.E.2d 74 (1951).

4 Alaska—Mobil Oil Corp. v. Local Boundary Commission, 518 P.2d 92 (Alaska 1974).

End of Document

16D C.J.S. Constitutional Law § 2180

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2180. Creation, control, and regulation of school districts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056, 4191

The legislature may provide for the creation, control, and regulation of school districts without violating the due process guaranty as to the property rights of the district or of property owners therein.

Since a school district is an auxiliary of the state for purposes of education, the legislature may provide for its creation, control, and regulation, without violating the due process guaranty, with respect to the property rights of the district or of property owners therein.[1] Accordingly, no violation of due process has been found in statutes such as those authorizing an extension of the territory of a school district,[2] or those providing for the creation and organization of a consolidated school district,[3] or in providing for the transfer of property from one school district to another district,[4] regardless of whether the creation or alteration of a school district is,[5] or is not,[6] affected by the constitutional guaranties of procedural due process.

The legislature does not violate due process in providing for the attendance of pupils at schools outside the district of their residence and requiring the district from which they come to pay their tuition in the other district which they attend;[7] or in requiring a consolidated or annexing school district to assume a proportion of the indebtedness of a district from which territory

or property is taken;[8] or in disorganizing or dissolving a school district having an insufficient number of pupils, and attaching its territory to an adjoining school district;[9] or in subjecting property in annexed territory to taxation for payment of preexisting debts of the annexing district.[10]

Abolishing school district.

A statute abolishing school districts and vesting the property thereof in towns is not a taking of property without due process of law if the property is devoted to no new use.[11]

Footnotes

1 Ill.—Board of Ed. of Addison School Dist. No. 4, DuPage County v. Gates, 22 Ill. App. 3d 16, 316 N.E.2d 525 (2d Dist. 1974).
Me.—McGary v. Barrows, 156 Me. 250, 163 A.2d 747 (1960).
S.D.—Fairview Independent School Dist. No. 115-69 of Hand County v. County Bd. of Ed. of Hand County, 86 S.D. 417, 197 N.W.2d 413 (1972).
School districts do not have right to due process
Minn.—Independent School Dist. No. 281 v. Minnesota Dept. of Educ., 743 N.W.2d 315, 228 Ed. Law Rep. 458 (Minn. Ct. App. 2008).
Intervention in tax assessment appeals
School districts, as creatures of the state, could not charge that the state tax commission's rule requiring that motions to intervene be filed within 30 days of the institution of proceedings to review tax assessments violated their due process rights to notice and an opportunity to be heard.
Mo.—State ex rel. Brentwood School Dist. v. State Tax Commission, 589 S.W.2d 613 (Mo. 1979).

2 Ky.—Hume v. Grant, 165 Ky. 723, 178 S.W. 1028 (1915).

3 U.S.—Attorney General of State of Michigan v. Lowrey, 199 U.S. 233, 26 S. Ct. 27, 50 L. Ed. 167 (1905).
Wash.—Wheeler School Dist. No. 152 of Grant County v. Hawley, 18 Wash. 2d 37, 137 P.2d 1010 (1943).
Wis.—School Dist. No. 3 of Town of Adams v. Callahan, 237 Wis. 560, 297 N.W. 407, 135 A.L.R. 1081 (1941).

4 Cal.—San Carlos School Dist. v. State Bd. of Ed., 258 Cal. App. 2d 317, 65 Cal. Rptr. 711 (1st Dist. 1968).
Wash.—Moses Lake School Dist. No. 161 v. Big Bend Community College, 81 Wash. 2d 551, 503 P.2d 86 (1972).

5 Miss.—Winston County By and Through Bd. of Sup'rs v. Woodruff, 187 So. 2d 299 (Miss. 1966).

6 Mich.—Penn School Dist. No. 7 v. Board of Ed. of Lewis-Cass Intermediate School Dist. of Cass County, 14 Mich. App. 109, 165 N.W.2d 464 (1968).
Neb.—School Dist. of Gering in Scotts Bluff County v. Stannard, 193 Neb. 624, 228 N.W.2d 600 (1975).

7 Iowa—Lincoln Tp. School Dist. of Dallas County v. Redfield Consol. School Dist. of Redfield, 226 Iowa 298, 283 N.W. 881 (1939).
Wis.—City of Manitowoc v. Town of Manitowoc Rapids, Manitowoc County, 231 Wis. 94, 285 N.W. 403 (1939).

8 Mich.—School Dist. No. 3 of Bloomfield Tp., Oakland County, v. School Dist. of City of Pontiac, 261 Mich. 352, 246 N.W. 145 (1933).
Pa.—Montella v. Camillo, 425 Pa. 199, 228 A.2d 775 (1967).

9 U.S.—Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe, 578 F.3d 753, 248 Ed. Law Rep. 86 (8th Cir. 2009).
Okla.—Lowden v. Luther, 1941 OK 412, 190 Okla. 31, 120 P.2d 359 (1941).

10 Okla.—Lowden v. Luther, 1941 OK 412, 190 Okla. 31, 120 P.2d 359 (1941).
S.C.—Nesbitt v. Gettys, 219 S.C. 221, 64 S.E.2d 651 (1951).

11 Mo.—State ex rel. School Dist. of Fulton v. Davis, 361 Mo. 730, 236 S.W.2d 301 (1951).

R.I.—In re School Committee of North Smithfield, 26 R.I. 164, 58 A. 628 (1904).

End of Document

16D C.J.S. Constitutional Law § 2181

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2181. Annexing or detaching territory

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056

As between a state and its political subdivisions, the State may, without violating the due process guaranties, take a subdivision's property and hold it, or vest it in other agencies, or expand or contract its territory, or unite the whole or a part of it with some other subdivision.

As between a state and its political subdivisions, the State may, without violating the due process guaranties, take a subdivision's property and hold it, or vest it in other agencies, or expand or contract its territory, or unite the whole or a part of it with some other subdivision.[1] Similarly, questions of public policy, convenience, and welfare relating to any change in subdivision boundaries are of purely legislative cognizance and any action in regard thereto does not come within the due process clauses of either the state or federal constitutions.[2]

Generally, therefore, a statute providing for the annexation or detachment of territory to or from a political subdivision does not constitute a taking or deprivation of property without due process of law,[3] especially in light of the potential for additional benefits to residents and property owners as a result of the annexation.[4] Even if the property owner receives no benefits from the annexation, however, and even if the market value of the owner's land suffers from such annexation, the annexation does

not constitute a taking of property without due process.[5] Thus, a decline in the value of a home as a result of a change in town lines is not a deprivation of property cognizable under the Fourteenth Amendment's Due Process Clause.[6]

Taxation and debt issues.

A statute is not a denial of due process because it subjects property of residents in the annexed areas to taxation[7] or because the annexation or detachment results in a higher rate of taxation as against individual owners of property.[8] Likewise, the fact that residents of an area annexed to a political subdivision become liable for the subdivision's preexisting debts does not violate the due process guaranty.[9]

Consolidation.

A statute authorizing contiguous cities, towns, or districts to consolidate does not contravene the guaranty of due process of law[10] even though the consolidation may subject the property of a smaller district's inhabitants to payment of a portion of a larger district's debts.[11]

Issuing revenue bonds.

Statutes authorizing political subdivisions to issue revenue bonds to acquire, lease, and dispose of property for the purposes of economic development do not constitute a taking of property without due process of law.[12]

Footnotes

1 Ga.—Holloway v. Mayor and Council of Town of Whitesburg, 225 Ga. 152, 166 S.E.2d 576 (1969).
S.D.—Tripp County v. State, 264 N.W.2d 213 (S.D. 1978).

2 S.D.—Tripp County v. State, 264 N.W.2d 213 (S.D. 1978).

3 U.S.—Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321 (6th Cir. 1967).
Ill.—North Maine Fire Protection Dist. v. Village of Niles, 50 Ill. App. 3d 690, 8 Ill. Dec. 495, 365 N.E.2d 733 (1st Dist. 1977).
Ky.—Louisville Shopping Center, Inc. v. City of St. Matthews, 635 S.W.2d 307 (Ky. 1982).
Ohio—Trustees of Bazetta Tp. v. City of Warren, 46 Ohio App. 2d 147, 75 Ohio Op. 2d 121, 349 N.E.2d 318 (11th Dist. Trumbull County 1975).
Change of status of land
The change of status of a tract of land from rural to city, by the exercise of power granted a city to extend its limits, is not a deprivation of property without due process of law.
Kan.—State ex rel. Jordan v. City of Overland Park, 215 Kan. 700, 527 P.2d 1340 (1974).

4 Ky.—Louisville Shopping Center, Inc. v. City of St. Matthews, 635 S.W.2d 307 (Ky. 1982).

5 Tex.—City of Pasadena v. Houston Endowment, Inc., 438 S.W.2d 152 (Tex. Civ. App. Houston 14th Dist. 1969), writ refused n.r.e., (May 14, 1969).

6 U.S.—Scott v. Town of Monroe, 306 F. Supp. 2d 191 (D. Conn. 2004).

7 Ga.—Lee v. City of Jesup, 222 Ga. 530, 150 S.E.2d 836 (1966).
N.C.—In re Annexation Ordinance No. D-21927 Adopted by City of Winston-Salem, N.C., December 17, 1979-Area I, 303 N.C. 220, 278 S.E.2d 224 (1981).
Fourteenth Amendment not implicated

The allegedly arbitrary and capricious imposition of taxes resulting from the purportedly unlawful annexation by a town did not implicate the Fourteenth Amendment due process rights of residents of the annexed area.

U.S.—Jordan v. Town of Morningside, MD, 30 Fed. Appx. 144 (4th Cir. 2002).

8 Ill.—In re Petition for Detachment of Land from Morrison Community Hosp. Dist., 318 Ill. App. 3d 922, 251 Ill. Dec. 796, 741 N.E.2d 683 (3d Dist. 2000).

S.D.—Tripp County v. State, 264 N.W.2d 213 (S.D. 1978).

9 Mo.—Barnes v. Kansas City, 359 Mo. 519, 222 S.W.2d 756, 10 A.L.R.2d 553 (1949).

10 U.S.—Doyle v. Municipal Commission of State of Minn., 340 F. Supp. 841 (D. Minn. 1972), judgment aff'd, 468 F.2d 620 (8th Cir. 1972).

Tex.—Phillips v. Minden Independent School Dist., 152 S.W.2d 1114 (Tex. Civ. App. Texarkana 1941).

11 Wash.—Wheeler School Dist. No. 152 of Grant County v. Hawley, 18 Wash. 2d 37, 137 P.2d 1010 (1943).

12 Ill.—People ex rel. City of Salem v. McMackin, 53 Ill. 2d 347, 291 N.E.2d 807 (1972).

La.—LeBlanc v. Police Jury of Rapides Parish, 188 So. 2d 131 (La. Ct. App. 3d Cir. 1966), writ refused, 249 La. 618, 188 So. 2d 607 (1966).

S.D.—Clem v. City of Yankton, 83 S.D. 386, 160 N.W.2d 125 (1968).

End of Document

16D C.J.S. Constitutional Law § 2182

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2182. Annexing or detaching territory—Elections and consent by residents

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056

Persons within the territory proposed to be annexed do not have an absolute constitutional right under the due process guaranty to vote on a proposed annexation or detachment or to vote for the members of the city's governing board which adopts the annexation ordinance.

Persons within the territory proposed to be annexed do not have an absolute constitutional right under the due process guaranty to vote on a proposed annexation,[1] or detachment,[2] or to vote for the members of the city's governing board which adopts the annexation ordinance.[3]

A statute relating to the annexation of territory to an incorporated municipality on the petition of the owners is not unconstitutional on the ground that the general good of the adjacent area is not considered in making the decision on annexation and that it therefore deprives citizens outside of the territory to be annexed of their rights to due process.[4] In addition, the constitutional rights of a property owner under the Fourteenth Amendment are not violated by virtue of the inclusion of the owner's farm in a referendum to annex a contiguous subdivision even though the farmland is sparsely populated and the subdivision is exclusively residential.[5]

A statute providing that an annexation becomes operative on the happening of certain contingencies, although without the assent and even over the protests of the residents and landowners, may not be a denial of due process.[6] The Fourteenth Amendment permits a city which calls an annexation election to exclude from the annexation certain areas that are scattered and isolated and which contain residences of electors who do not want to be annexed.[7]

Annexation petitions.

A statute requiring the owners of not less than one-half value of the real and personal property located in the proposed annexation area to sign the annexation petition does not violate due process.[8] In addition, the exclusion of a nonresident property owner and his or her property in determining whether the percentage requirements for an annexation petition have been met do not result in a denial of due process.[9]

Footnotes

1 U.S.—Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002).
Cal.—Weber v. City Council, 9 Cal. 3d 950, 109 Cal. Rptr. 553, 513 P.2d 601 (1973).
N.C.—In re Annexation Ordinance No. D-21927 Adopted by City of Winston-Salem, N.C., December 17, 1979-Area I, 303 N.C. 220, 278 S.E.2d 224 (1981).
S.C.—General Battery Corp. v. City of Greer, 263 S.C. 533, 211 S.E.2d 659 (1975).
Denial of right to vote to residents of "uninhabited territory"
The denial of the right to vote on annexation to residents of a territory that is deemed uninhabited because it contains fewer than a certain number of registered voters, while requiring the vote of the residents of the inhabited territory for annexation thereof, does not violate due process; the differences in the nature and surrounding circumstances, including facilitating the continued development of cities and the need to extend the beneficial services of the municipality to the citizens of the state, are sufficient to render such constitutional objections inapplicable.
Cal.—Weber v. City Council, 9 Cal. 3d 950, 109 Cal. Rptr. 553, 513 P.2d 601 (1973).

2 Ill.—In re Petition for Detachment of Land from Morrison Community Hosp. Dist., 318 Ill. App. 3d 922, 251 Ill. Dec. 796, 741 N.E.2d 683 (3d Dist. 2000).

3 N.C.—In re Annexation Ordinance No. D-21927 Adopted by City of Winston-Salem, N.C., December 17, 1979-Area I, 303 N.C. 220, 278 S.E.2d 224 (1981).

4 Ohio—Eaton v. Board of County Com'rs of Summit County, 49 Ohio App. 2d 24, 3 Ohio Op. 3d 101, 358 N.E.2d 1377 (9th Dist. Summit County 1974).
Area annexed more than as defined in petition
A boundary review board's decision, requiring the city to annex an area more than three times the size of the original area defined in the petition for annexation signed by the affected property owners and approved by a city ordinance, failed to comport with statutory provisions governing annexation or with due process where the property owners residing outside of the original area defined in the petition had no opportunity to sign or oppose the petition for annexation.
Wash.—Interlake Sporting Ass'n, Inc. v. Washington State Boundary Review Bd. for King County, 158 Wash. 2d 545, 146 P.3d 904 (2006).

5 Tenn.—State ex rel. Smith v. Town of Church Hill, 828 S.W.2d 385 (Tenn. Ct. App. 1991).

6 La.—Kansas City Southern Ry. Co. v. City of Shreveport, 354 So. 2d 1362 (La. 1978).

7 Ala.—City of Birmingham v. Wilkinson, 516 So. 2d 585 (Ala. 1987).

8 Ariz.—Roberts v. City of Mesa, 158 Ariz. 42, 760 P.2d 1091 (Ct. App. Div. 2 1988).

9 La.—Kansas City Southern Ry. Co. v. City of Shreveport, 354 So. 2d 1362 (La. 1978).

End of Document

16D C.J.S. Constitutional Law § 2183

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

2. Creation, Alteration, and Regulation of Political Subdivisions

§ 2183. Annexing or detaching territory—Judicial relief for denial of due process

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4056

Under various statutes, judicial relief may be available for the denial of due process in regard to annexation proceedings.

Statutory provisions relating to judicial review of annexation proceedings are not subject to attack on constitutional grounds unless they are so arbitrary and unreasonable as to constitute a denial of due process.[1] However, the guaranty has been considered violated where a statute constitutes a palpably arbitrary, unnecessary, and flagrant invasion of personal and property rights,[2] as where it includes property which is not presently, and cannot be, benefited directly or indirectly, and is included only that it may pay for the benefit to other property.[3] Thus, due process and due course of law may require judicial relief from annexation, where plausible claims of fraud or discrimination are established,[4] or if the area annexed fixes arbitrary or unreasonable boundaries under the law.[5] In considering whether an annexation ordinance is so unreasonable that it is lacking in due process, the problem should be approached broadly and in a manner commensurate with the history of the growth of the municipality, its present necessities, and its promise of future development, and not in the narrow and restricted view of the needs of city or of the property itself.[6]

Wrongful annexation.

Landowners in a territory wrongfully annexed to a political subdivision by legislative action are entitled to a remedy in order to afford due process.[7] If remonstrators are claiming technical, procedural wrongdoings by a municipality as part of the annexation process arising out of statutes other than statutes governing remonstrance and annexation, the remonstrators must establish a violation of substantive due process or due course of law rights.[8]

Time limitations.

Time limitations specified in a statute establishing a procedure for annexation and a statute regarding appeals from the adoption of an annexation ordinance do not constitute unreasonable procedural burdens on challengers' due process rights.[9] Similarly, a statute limiting appeals of a board's annexation orders to a specified period of time does not violate due process.[10]

Footnotes

1 U.S.—Doyle v. Municipal Commission of State of Minn., 340 F. Supp. 841 (D. Minn. 1972), judgment aff'd, 468 F.2d 620 (8th Cir. 1972); Raintree Homeowners Ass'n, Inc. v. City of Charlotte, 543 F. Supp. 625 (W.D. N.C. 1982), judgment aff'd, 710 F.2d 132 (4th Cir. 1983).

2 Fla.—Gillete v. City of Tampa, 57 So. 2d 27 (Fla. 1952).

3 U.S.—Myles Salt Co. v. Board of Com'rs of Iberia & St. Mary Drainage Dist., 239 U.S. 478, 36 S. Ct. 204, 60 L. Ed. 392 (1916).
Tex.—State ex rel. Walker v. City of Gladewater, 139 S.W.2d 283 (Tex. Civ. App. Texarkana 1940), judgment rev'd on other grounds, 138 Tex. 173, 157 S.W.2d 641 (Comm'n App. 1941).

4 Ind.—Bradley v. City of New Castle, 764 N.E.2d 212 (Ind. 2002).

5 Ariz.—Taylor v. City of Chandler, 17 Ariz. App. 346, 498 P.2d 158 (Div. 1 1972).
Arbitrary and irrational manner
The decisions of two towns to change their border did not violate substantive due process, absent any allegation that the towns acted in an arbitrary or irrational manner and where their decision was made pursuant to authority delegated to them by the state legislature.
U.S.—Scott v. Town of Monroe, 306 F. Supp. 2d 191 (D. Conn. 2004).

6 Nev.—State ex rel. Mathews v. City of Reno, 71 Nev. 208, 285 P.2d 551 (1955).

7 Neb.—Williams v. Buffalo County, 181 Neb. 233, 147 N.W.2d 776 (1967).

8 Ind.—City of Kokomo ex rel. Goodnight v. Pogue, 940 N.E.2d 833 (Ind. Ct. App. 2010).

9 N.C.—Matter of City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984).

10 Minn.—Rockford Tp. v. City of Rockford, 608 N.W.2d 903 (Minn. Ct. App. 2000).

16D C.J.S. Constitutional Law § 2184

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

3. Notice and Opportunity to Be Heard in Proceedings Regarding Political Subdivisions

§ 2184. Notice and opportunity to be heard in proceedings regarding political subdivisions, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4055, 4056

The due process guaranty may require provision for some kind of reasonable notice to persons interested in the proceedings for the organization or alteration of a political subdivision although there is authority to the contrary.

The guaranty of due process of law may require that provision be made for some kind of reasonable notice to persons interested in the proceedings for the organization or alteration of a political subdivision.[1] A statute, resolution, or other action, which makes no provision for adequate notice to, or an opportunity to be heard by, an interested owner whose property is included in, or added to, the subdivision area, with reference to the benefits or damages and the boundaries, has been found invalid as a denial of due process of law.[2] It is not necessary that the statute provide for notice of the preliminary proceeding or of every intermediate proceeding, but it is sufficient that the owner is given the right to notice and an opportunity to be heard on the questions of benefits and damages at some stage of the proceeding before his or her property is finally included in the subdivision limits.[3] However, where statutes require that a hearing be held on a protest against a proposed annexation, due process entitles the owners of affected property to notice of the time and place of the hearing.[4]

Under other authority, it is a settled rule of due process that a democratically elected legislature has the prerogative to establish the procedures by which a local government entity is created or its boundaries expanded, and a person does not have the constitutional right to notice, a hearing, or the right to object. Thus, the process due when a municipal corporation forms or expands is by the grace of the legislature, not by constitutional commandment.[5] Under such authority, there is no constitutional requirement that affected landowners be notified before passage of an annexation ordinance and failure to give such notice is not a denial of due process of law.[6] Thus, it has been found that a statutory provision for the annexing or detaching of territory without notice to the persons whose property is annexed or detached is not a taking without due process and is not unconstitutional for want of such process.[7] Moreover, due process of law does not give a property owner an absolute right to notice and a hearing before the property may be included within the limits of a political subdivision, by reason of the creation of which the property will be subjected to the burden of a general tax for the purposes of which the district was formed, in contradistinction to a tax or assessment for some local benefit.[8]

Hearings and cross-examination.

Due process rights are not violated by failing to allow cross-examination of witnesses at a public hearing concerning annexation of township land to a city where a full de novo hearing is allowed before the trial court with the right to subpoena and fully cross-examine any adverse witness who testifies at the public hearing.[9] In addition, no deprivation of procedural due process arises when the board of county commissioners allows only six hours for a hearing on annexation and refuses to allow the landowners to cross-examine witnesses, where the landowners are given an opportunity to present written questions to the city and its witnesses after the first hearing, all of which are considered by the board.[10]

Footnotes

1 Kan.—Pishny v. Board of County Com'rs of County of Johnson County, 47 Kan. App. 2d 547, 47 Kan. App. 2d 1040, 277 P.3d 1170 (2012), as modified, (July 27, 2012).
Ky.—Somsen v. Sanitation Dist. No. 1 of Jefferson County, 303 Ky. 284, 197 S.W.2d 410 (1946).
Okla.—Sewer Imp. Dist. No. 1, Tulsa County v. Foster, 1951 OK 107, 205 Okla. 201, 236 P.2d 678 (1951).
Notice to nonpetitioning owners
Petitions for disconnection from a newly formed municipal corporation did not abridge the due process rights of nonpetitioning owners of property in the territories to be disconnected where the disconnection statutes provided for notice to nonpetitioning owners, which protected their right to be heard.
Ill.—In re Petition to Disconnect Certain Territory from Village of Campton Hills, Kane County, 386 Ill. App. 3d 355, 326 Ill. Dec. 63, 899 N.E.2d 280 (2d Dist. 2008).
Residents by petition create district and determine boundaries
Where residents of a locality by petition cause a district to be created, the boundaries of which are determined by the petitioners themselves rather than by legislative action, due process requires that all landowners in the area be given notice of the proposed incorporation and an opportunity to be heard.
Ill.—People v. Walker, 59 Ill. App. 3d 192, 16 Ill. Dec. 736, 375 N.E.2d 843 (2d Dist. 1978).

2 Mont.—Scilley v. Red Lodge-Rosebud Irr. Dist., 83 Mont. 282, 272 P. 543 (1928).
Okla.—Sewer Imp. Dist. No. 1, Tulsa County v. Foster, 1951 OK 107, 205 Okla. 201, 236 P.2d 678 (1951).

3 Ariz.—Maricopa County Municipal Water Conservation Dist. No. 1 v. La Prade, 45 Ariz. 61, 40 P.2d 94 (1935).
Mo.—State ex rel. Webster Groves Sanitary Sewer Dist. v. Smith, 342 Mo. 365, 115 S.W.2d 816 (1938).
Tex.—Rutledge v. State, 117 Tex. 342, 7 S.W.2d 1071 (1928).

4 Cal.—Forest Lawn Co. v. City Council of City of West Covina, 244 Cal. App. 2d 343, 53 Cal. Rptr. 452 (2d Dist. 1966).

5 Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).
Hearing on factual question not required

Due process of law did not require a hearing on a factual question; for instance, the fact that statutes which created and established a housing authority in certain cities and which provided that such authority was not to transact any business until the governing body of the city, under the terms, conditions, and procedure laid down by the housing act, found and declared a need for it to function, did not provide for notice and an opportunity for a hearing upon a question of need for the activating authority and did not make the statute violative of the due process clause of the state constitution.

Ga.—Telford v. City of Gainesville, 208 Ga. 56, 65 S.E.2d 246 (1951).

6 Ariz.—California Portland Cement Co. v. Picture Rocks Fire Dist., 143 Ariz. 170, 692 P.2d 1019 (Ct. App. Div. 2 1984).

Colo.—State Farm Mut. Auto. Ins. Co. v. City of Lakewood, 788 P.2d 808 (Colo. 1990).

Postdeprivation mechanism available

A city's annexation of a property owner's land without prior notice of an annexation hearing did not violate the Due Process Clause, absent a showing of a lack of an adequate postdeprivation mechanism to provide the owner with just compensation for the alleged taking.

U.S.—Cormack v. Settle-Beshears, 474 F.3d 528 (8th Cir. 2007).

7 Colo.—Fort Collins-Loveland Water Dist. v. City of Fort Collins, 174 Colo. 79, 482 P.2d 986 (1971).

Mo.—Cherry v. City of Hayti Heights, 563 S.W.2d 72 (Mo. 1978).

Neb.—Holden v. City of Tecumseh, 188 Neb. 117, 195 N.W.2d 225 (1972).

N.C.—Texfi Industries, Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979), decision aff'd, 301 N.C. 1, 269 S.E.2d 142 (1980).

8 Cal.—In re Bonds of Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004 (1925).

N.C.—Town of Kenilworth v. Hyder, 197 N.C. 85, 147 S.E. 736 (1929).

S.D.—Williams v. Book, 75 S.D. 173, 61 N.W.2d 290 (1953).

9 Ohio—In re Appeal of Jefferson Twp. Bd. of Trustees, 78 Ohio App. 3d 493, 605 N.E.2d 435 (10th Dist. Franklin County 1992).

10 Kan.—Petition of City of Overland Park, 241 Kan. 365, 736 P.2d 923 (1987).

End of Document

16D C.J.S. Constitutional Law § 2185

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

G. Political Subdivisions

3. Notice and Opportunity to Be Heard in Proceedings Regarding Political Subdivisions

§ 2185. Mode, nature, and type of notice in proceedings regarding political subdivisions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4055, 4056

Where notice is required, there are no constitutional demands of due process restricting the mode, nature, and type of notice that must be given, and various notice provisions respecting the annexation of property to political subdivisions have been found sufficient.

Where notice is required, there are no constitutional demands of due process restricting the mode, nature, and type of notice that must be given,[1] and notice provisions respecting the annexation of property to political subdivisions,[2] such as those authorizing publication,[3] have been held sufficient to constitute due process of law in a variety of circumstances. A city's failure to strictly comply with a statute governing the publication of notice of a resolution of necessity in connection with the creation of a special assessment district has been found not to deprive the affected landowners of their due process rights.[4]

Footnotes

1 Cal.—Bookout v. Local Agency Formation Com., 49 Cal. App. 3d 383, 122 Cal. Rptr. 668 (5th Dist. 1975).

Any notice sufficient

N.C.—Texfi Industries, Inc. v. City of Fayetteville, 44 N.C. App. 268, 261 S.E.2d 21 (1979), decision aff'd, 301 N.C. 1, 269 S.E.2d 142 (1980).

2 Neb.—Nickel v. School Bd. of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953).

Failure to show harm

The original remonstrator failed to show any harm with regard to his lack of notice, lack of representation, and denial of the remonstrators' motions for a continuance.

Ind.—Custard v. City of South Bend, 423 N.E.2d 712 (Ind. Ct. App. 1981).

Error not of due process magnitude where there is actual notice

Where those possessing rights within the limits of territory annexed had actual notice and were actually at the hearing, error in a description in the notice was not of due process magnitude.

Wash.—City of Tukwila v. King County, 78 Wash. 2d 34, 469 P.2d 878 (1970).

3 Cal.—Bookout v. Local Agency Formation Com., 49 Cal. App. 3d 383, 122 Cal. Rptr. 668 (5th Dist. 1975).

Mo.—Cherry v. City of Hayti Heights, 563 S.W.2d 72 (Mo. 1978).

N.C.—Texfi Industries, Inc. v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980).

Posting in local newspaper

A town's posting notice of a comprehensive plan amendment designating a parcel of unincorporated land as a potential annexation area in a local newspaper provided sufficient notice to the owner of the land, and due process did not require the town to give the landowner individualized notice.

Wash.—Chevron U.S.A., Inc. v. Puget Sound Growth Management Hearings Bd., 156 Wash. 2d 131, 124 P.3d 640 (2005).

Effect of civil procedure rule

Where notice as prescribed by the legislature for annexation proceedings was properly given by publication, compliance with a rule of civil procedure generally requiring mailing of a copy of the notice to the defendant's last known address was unnecessary, and the failure to give notice under such rule did not deprive property owners within the territory to be annexed of their property without due process.

Iowa—Mason City v. Aeling, 209 N.W.2d 8 (Iowa 1973).

4 N.D.—Serenko v. City of Wilton, 1999 ND 88, 593 N.W.2d 368 (N.D. 1999).

End of Document

16D C.J.S. Constitutional Law VIII XXII H Refs.

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

Topic Summary | Correlation Table

Research References

A.L.R. Library

A.L.R. Index, Constitutional Law
A.L.R. Index, Due Process
A.L.R. Index, Fourteenth Amendment
West's A.L.R. Digest, Constitutional Law 4057 to 4066

End of Document

16D C.J.S. Constitutional Law § 2186

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2186. Making and financing public improvements, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4057

The action of the legislature in exercising its power to make public improvements, or of local bodies to which the power is delegated, cannot be assailed as denying due process of law, if such power is not abused or arbitrarily exercised, and the rights of interested persons are fully protected.

The action of state legislatures in authorizing or requiring the making of public improvements, both by direct action and also by the creation of municipal and quasi-municipal corporations for the purpose, may not be assailed as violating the Due Process Clause of the United States Constitution unless it is palpably arbitrary and hence a plain abuse of power.[1] The same is true of the action of local legislative bodies in determining the necessity of a public improvement within their jurisdictions.[2] A violation of due process is not necessarily involved in delegating to an officer or board the final authority to pass on the necessity of a public improvement.[3]

In order to constitute due process of law, assessments for local improvements must be for a public use, but the entire community, or even any considerable portion thereof, need not directly enjoy or participate in the improvements.[4] The taking is without due

process of law where the application of the statute in fact results in the confiscation of property[5] or in destroying or seriously impairing vested rights.[6]

Taxpayers have no due process right to be heard on the question of provisions for the financing of public improvement projects by a political subdivision, which has been granted full legislative powers in the premises unless the political subdivision acts ultra vires.[7] A statute applicable to all municipalities of a certain class, providing that an ordinance declaring that the improvement will be wholly or partly paid for by a federal loan or grant, or both, will be in full force immediately, and that in all other cases legal voters will have the right to submit the question to a referendum, is not unconstitutional as an arbitrary classification in violation of due process of law.[8] A statute authorizing the combination of water and sewer systems and their operation as a single system is not invalid because revenue from one part of the combined system may be used to pay for improvements to the other[9] and because water service may be discontinued for failure to pay sewer charges.[10]

Quasi-municipal corporations.

The legislature may permit municipalities to convey[11] or lease[12] existing improvements to quasi-municipal corporations and may provide for contracts between them for the use of improvements.[13]

Footnotes

1 U.S.—Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3 of Sevier County, Ark., 266 U.S. 379, 45 S. Ct. 136, 69 L. Ed. 335 (1924).
Conn.—Rocky Hill Inc. Dist. v. Hartford Rayon Corp., 122 Conn. 392, 190 A. 264 (1937).
Pa.—Tragesser v. Cooper, 313 Pa. 10, 169 A. 376 (1933).

2 Miss.—Memphis & C. Ry. Co. v. Bullen, 154 Miss. 536, 121 So. 826 (1928), aff'd, 282 U.S. 241, 51 S. Ct. 108, 75 L. Ed. 315, 72 A.L.R. 1096 (1931).
Acts not outrageous and arbitrary
A town's alleged acts, of widening a road adjacent to the property owners' property so that the road encroached on the property and having town snow plows use part of the property when turning around, were not so outrageous and arbitrary as to implicate the property owners' substantive due process rights.
U.S.—Ferran v. Town of Nassau, 471 F.3d 363 (2d Cir. 2006).
Installation of sewer system
A local government's installation of a sewer system did not amount to violations of residents' substantive due process rights, even if the residents could not afford the assessments for the cost of construction and would be forced to sell their property and move; the residents had no recognized fundamental right to live free of governmental regulation, to use septic tanks, or to have access to cheap sewers, and assessing the costs of construction onto those properties that would receive sewer hook-ups was not arbitrary government action and such action did not shock the conscience.
U.S.—Keller v. Los Osos Community Services Dist., 39 Fed. Appx. 581 (9th Cir. 2002).

3 Ind.—Smith v. Board of Com'rs of Hamilton County, 173 Ind. 364, 90 N.E. 881 (1910).

4 U.S.—Orr v. Allen, 245 F. 486 (S.D. Ohio 1917), aff'd, 248 U.S. 35, 39 S. Ct. 23, 63 L. Ed. 109 (1918).

5 U.S.—Gast Realty & Investment Co. v. Schneider Granite Co., 240 U.S. 55, 36 S. Ct. 254, 60 L. Ed. 523 (1916).
Acquisition of private way
Statutes providing a method of acquiring a grant of private ways to go to and from individuals' farms or places of residence violate due process.
Ga.—Cato v. Arnold, 222 Ga. 567, 151 S.E.2d 149 (1966).

6 U.S.—U.S. v. Heinrich, 12 F.2d 938 (D. Mont. 1926), aff'd, 16 F.2d 112 (C.C.A. 9th Cir. 1926).

7 Miss.—Bond v. Marion County Bd. of Sup'rs, 807 So. 2d 1208 (Miss. 2001).

8 Ill.—City of Mt. Olive v. Braje, 366 Ill. 132, 7 N.E.2d 851 (1937).

9 Kan.—City of Lawrence v. Robb, 175 Kan. 495, 265 P.2d 317 (1954).
Mo.—City of Maryville v. Cushman, 363 Mo. 87, 249 S.W.2d 347 (1952).

10 Kan.—City of Lawrence v. Robb, 175 Kan. 495, 265 P.2d 317 (1954).

11 Pa.—Williams v. Samuel, 332 Pa. 265, 2 A.2d 834 (1938).

12 N.J.—Port of New York Authority v. City of Newark, 17 N.J. Super. 328, 85 A.2d 815 (Ch. Div. 1952).

13 Pa.—Gemmill v. Calder, 332 Pa. 281, 3 A.2d 7 (1938).

End of Document

16D C.J.S. Constitutional Law § 2187

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2187. Procedure for making public improvement, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4057

The procedure for the making of a public improvement must fully protect the rights of property owners under the Due Process Clause.

The procedure prescribed for the making of a public improvement must be such as fully to protect the rights of property owners under the Due Process Clause,[1] and the enactment of an improvement ordinance by a municipality, to constitute due process, must be in substantial compliance with the statute providing for the improvement.[2] A landowner attacking an assessment on the ground that the local board has failed to acquire original jurisdiction may rest on the constitutional guaranty that his or her property may not be taken without due process of law.[3]

The fact that only resident freeholders may sign the initiatory petition to create an irrigation district,[4] or the fact that owners of property within a city or village are not authorized to join in a petition for the creation of a reclamation district,[5] does not deprive owners of their property without due process of law since no authorized person is excluded by the statute from representing

landowners. Moreover, the failure to provide for a referendum for the construction, acquisition, or enlargement of specific public improvements is not a deprivation of due process.[6]

Taxpayers have no due process right to be heard on the question of desirability or feasibility of public improvement projects by a political subdivision, which has been granted full legislative powers in the premises, unless the political subdivision acts ultra vires.[7] Similarly, a transportation commission's action to establish the location of a highway bypass is legislative and, thus, landowners whose property is intersected by the bypass have no due process right to an evidentiary hearing.[8]

While a denial of judicial review with respect to an administrative agency's decision as to the location of a proposed highway could, under some circumstances, amount to a denial of due process,[9] a statute, which in reference to administrative action relocating a highway, authorizes judicial review of such action by error proceedings alone does not violate due process.[10]

Footnotes

1 Ala.—Jasper Land Co. v. City of Jasper, 220 Ala. 639, 127 So. 210 (1930).
Mo.—Mudd v. Wehmeyer, 323 Mo. 704, 19 S.W.2d 891 (1929).

2 Ala.—Byars v. Town of Boaz, 229 Ala. 22, 155 So. 383 (1934).

3 Cal.—Beck v. Ransome-Crummey Co., 42 Cal. App. 674, 184 P. 431 (1st Dist. 1919).

4 N.M.—Davy v. McNeill, 1925-NMSC-040, 31 N.M. 7, 240 P. 482 (1925).

5 Neb.—Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

6 Ill.—DiSanto v. City of Warrenville, 59 Ill. App. 3d 931, 17 Ill. Dec. 289, 376 N.E.2d 288 (2d Dist. 1978).

7 Miss.—Bond v. Marion County Bd. of Sup'rs, 807 So. 2d 1208 (Miss. 2001).

8 Iowa—Bernau v. Iowa Dept. of Transp., 580 N.W.2d 757 (Iowa 1998).
City's determination of blight under urban renewal statute was legislative
Okla.—City of Midwest City v. House of Realty, Inc., 2008 OK 28, 198 P.3d 886 (Okla. 2008).

9 N.C.—Orange County v. North Carolina Dept. of Transp., 46 N.C. App. 350, 265 S.E.2d 890 (1980).

10 Neb.—Emry v. Lake, 181 Neb. 568, 149 N.W.2d 520 (1967).

End of Document

16D C.J.S. Constitutional Law § 2188

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2188. Assessments and special taxes for public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4059

Without denying due process, the legislature may raise money to pay for public improvements by a tax on all the property in a district, or it may authorize an assessment according to estimated benefits.

While it has been found that within the Due Process Clause, the laws for the levy and collection of the general taxes stand upon a different footing than laws for the levy and collection of special assessments or special taxes,[1] the funds necessary to pay for the land taken or damaged and for other costs of a public improvement may be raised in the manner prescribed by the legislature under its general power of taxation.[2]

The legislature may, therefore, without violating the Due Process Clause, itself raise,[3] or authorize the taxing district to raise,[4] the necessary amount by a tax levied on all the property in the district in the same manner in which other taxes are levied, or it may authorize or require the assessment of the whole or any part of the cost on the property that is supposed to be benefited by the improvement.[5] In assessing benefits under the latter rule, it has uniformly been found that a statute or ordinance which directs that each tract be assessed in proportion to the actual enhancement of its value by reason of the improvement provides a fair basis for assessment and is constitutional.[6]

The legislature may direct that all lands within the district which, on a hearing, are found to be benefited by the improvement will be included,[7] or the legislature or subordinate legislative body may prescribe the territorial limits within which such assessments will be levied, and its determination as to what lands will be benefited is conclusive and cannot be assailed as a denial of due process unless arbitrary, capricious, or confiscatory.[8]

In like manner, the legislature may direct that the amount to be raised will be apportioned among the lands within the district in accordance with the benefits accruing to each tract as determined by viewers or commissioners,[9] or it may prescribe a definite rule or basis for the apportionment of benefits and assessments.[10] The assessment must, however, be imposed with reference to some system of just apportionment,[11] and assessments which are plainly arbitrary or unreasonably discriminatory are unconstitutional.[12]

Footnotes

1 Neb.—Frye v. Haas, 182 Neb. 73, 152 N.W.2d 121 (1967).

2 U.S.—Browning v. Hooper, 269 U.S. 396, 46 S. Ct. 141, 70 L. Ed. 330 (1926).
N.Y.—New York Cent. & H.R.R. Co. v. City of Yonkers, 238 N.Y. 165, 144 N.E. 490 (1924).

3 Tex.—Hester & Roberts v. Donna Irr. Dist., Hidalgo County, No. 1, 239 S.W. 992 (Tex. Civ. App. San Antonio 1922), writ refused.

4 Cal.—Saunders v. Carr, 268 Cal. App. 2d 10, 74 Cal. Rptr. 147 (2d Dist. 1968).
Fla.—State v. Anna Maria Island Erosion Prevention Dist., Manatee County, 58 So. 2d 845 (Fla. 1952).
Ill.—People ex rel. Hanrahan v. Caliendo, 50 Ill. 2d 72, 277 N.E.2d 319 (1971).

5 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).
Neb.—Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).
Ohio—Laskey v. Hilty, 91 Ohio App. 136, 48 Ohio Op. 272, 107 N.E.2d 899 (6th Dist. Lucas County 1951).

6 U.S.—Voigt v. City of Detroit, 184 U.S. 115, 22 S. Ct. 337, 46 L. Ed. 459 (1902).
Mich.—Kane v. Williamstown Township, 301 Mich. App. 582, 836 N.W.2d 868 (2013).
S.C.—Wright v. Proffitt, 261 S.C. 68, 198 S.E.2d 275 (1973).
As to the benefit analysis in this regard, see § 2189.

7 U.S.—Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896).

8 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).
Mo.—Bridges Asphalt Co. v. Jacobsmeyer, 346 Mo. 609, 142 S.W.2d 641 (1940).
Okla.—Holt v. Board of Com'rs of Oklahoma County, 1951 OK 249, 205 Okla. 178, 236 P.2d 476 (1951).
Hospital service assessment
A hospital service assessment did not violate taxpayers' rights to due process and equal protection; a special tax district was created by the county to allow the assessment of each parcel of real property in the county for the purpose of providing hospital-based care within the district; the county was authorized to create a special district for the purpose of providing health services; the situation did not present an extraordinary case such that the question of benefit to the taxpayer would be a matter for the courts, rather than the legislature, to decide; and there was no evidence of abuse of legislative discretion.
Ga.—Greene County Bd. of Com'rs v. Higdon, 277 Ga. App. 350, 626 S.E.2d 541 (2006).

9 N.Y.—New York Cent. & H.R.R. Co. v. City of Rochester, 129 A.D. 805, 114 N.Y.S. 779 (4th Dep't 1909), aff'd, 198 N.Y. 570, 92 N.E. 1093 (1910).

10 Cal.—Municipal Imp. Co. v. Thompson, 201 Cal. 629, 258 P. 955 (1927).
N.M.—Davy v. McNeill, 1925-NMSC-040, 31 N.M. 7, 240 P. 482 (1925).

11 Mo.—Hesse-Rix Co. v. Krug, 319 Mo. 880, 6 S.W.2d 570 (1928).
Okla.—St. Louis-San Francisco Ry. Co. v. City of Tulsa, 1935 OK 93, 170 Okla. 398, 41 P.2d 116 (1935).
S.C.—Newton v. Hanlon, 248 S.C. 251, 149 S.E.2d 606 (1966).
No more than fair share of costs

At the time the amount of assessment is determined, a landowner has a distinct interest in seeing that his property bears no more than its fair share of costs; this is a constitutionally protected property interest, and strictures of due process are applicable.

Kan.—Dodson v. City of Ulysses, 219 Kan. 418, 549 P.2d 430 (1976).

12 U.S.—Road Imp. Dist. No. 1 of Franklin County, Ark. v. Missouri Pac. R. Co., 274 U.S. 188, 47 S. Ct. 563, 71 L. Ed. 992 (1927).

Ariz.—Weitz v. Davis, 102 Ariz. 40, 424 P.2d 168 (1967).

Cal.—Cogan v. City of Los Angeles, 34 Cal. App. 3d 516, 110 Cal. Rptr. 100 (2d Dist. 1973).

Or.—Wing v. City of Eugene, 249 Or. 367, 437 P.2d 836 (1968).

Must be truly irrational to violate substantive due process rights

U.S.—Creason v. City of Washington, 435 F.3d 820 (8th Cir. 2006).

Assessments collected under police power

Assessments collected by a city under the police power, rather than under its taxing power, remain subject to fairness and due process protections.

Minn.—American Bank of St. Paul v. City of Minneapolis, 802 N.W.2d 781 (Minn. Ct. App. 2011).

End of Document

16D C.J.S. Constitutional Law § 2189

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2189. Assessments and special taxes for public improvements—Benefit analysis

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4059

Generally, special assessments for local improvements can be justified only on the theory of special benefits accruing to the property assessed; thus, the validity of special assessments depends on analysis of the charge and the benefit received, and assessments charged without relationship to the benefit received are arbitrary and capricious and violate due process.

Generally, special assessments for local improvements can be justified only on the theory of special benefits accruing to the property assessed.[1] Due process of law is denied where the improvement district includes, or assessments are levied on, lands which are not benefited or capable of deriving benefit from the improvement;[2] or where the assessments exceed, or are out of all proportion to, the amount of benefits[3] or value of the property.[4]

In other words, the validity of special assessments depends on analysis of the charge and the benefit received, and assessments charged without relationship to the benefit received are arbitrary and capricious and violate due process.[5] If there is not a proportionate relationship, then a special assessment would be akin to the taking of property without due process of law; to be validly imposed, a special assessment must benefit the assessed properties in proportion to the benefit received.[6] Thus, an

assessment which exceeds the value of the benefit is arbitrary; it exceeds the limits of the police power and deprives one of property without due process of law in violation of the Fourteenth Amendment.[7] Even more, if no special benefit has been conferred upon the property subjected to tax, any assessment levied is tantamount to a confiscation of property without due process.[8]

On the other hand, it is not essential to the validity of an assessment that all persons assessed should be equally benefited.[9] Moreover, it has been found that taxation of property by a local improvement district with no direct benefits to the property does not amount to a palpable and arbitrary abuse of power such as would offend substantive due process, absent an issue as to whether the actual inclusion of the property within the district was arbitrary and constituted an abuse of power.[10] In addition, it has been considered that the due process rights of property owners were not violated by a statute providing that the cost of services expended in connection with a project which is abandoned would be spread against the property of the original petitioners, based on the same benefit theory as if the improvement had been completed, and if the sum was large enough to create an undue hardship on original petitioners, it would be spread generally over the district.[11] The omission of property benefited from the area which encompasses property assessed for an improvement likewise does not deprive an assessed owner of due process if the omission is not made arbitrarily or fraudulently.[12]

The rule that special assessments are levied on the basis of benefits to the property assessed has no application, however, to general ad valorem taxes assessed against property within a water conservancy district under a statute whereby the liability for special assessments can arise only by the voluntary act of the persons affected,[13] and where a general tax, to meet the obligations of an improvement district, is distributed in proportion to estimated benefits, an exaction exceeding such benefits does not amount to spoliation or constitute a plain abuse of power.[14]

It has also been found that the legislature may, without denying due process of law, authorize a municipal corporation to charge the owner of a city lot with the cost of constructing a sidewalk in front of it, irrespective of benefits thereto;[15] that an assessment, otherwise legal, is not unconstitutional because, owing to its present particular use, the lot assessed is not benefited by the improvement;[16] or because there may not be a present actual benefit at the time an improvement district is formed, where it may reasonably be anticipated that benefit may accrue in the future.[17]

An assessment for benefits from improvements previously made is not for that reason invalid as constituting a deprivation of property without due process of law,[18] and this is so although the amount so collected is to be used for other public purposes to which public funds are properly applicable.[19]

Footnotes

1 U.S.—Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897 (C.C.A. 10th Cir. 1947).
Ariz.—Weitz v. Davis, 102 Ariz. 40, 424 P.2d 168 (1967).
Fla.—Utley v. City of St. Petersburg, 107 Fla. 6, 144 So. 58 (1932).
Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).
Greater benefit to unimproved property
A sewer district assessment formula ascribing a greater benefit to unimproved property than improved property generally could properly be applied by a city in determining the amount of benefit to a particular property without violating due process.
Or.—Vail v. City of Bandon, 53 Or. App. 133, 630 P.2d 1339 (1981).

2 Conn.—Rocky Hill Inc. Dist. v. Hartford Rayon Corp., 122 Conn. 392, 190 A. 264 (1937).
Md.—Maryland & P. R. Co. v. Nice, 185 Md. 429, 45 A.2d 109 (1945).

Mo.—DeFraties v. Kansas City, 521 S.W.2d 385 (Mo. 1975).
Wash.—Hasit LLC v. City of Edgewood (Local Improvement Dist. #£1), 179 Wash. App. 917, 320 P.3d 163 (Div. 2 2014).

3 Fla.—City of Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968).
Md.—Harlan v. Town of Bel Air, 178 Md. 260, 13 A.2d 370 (1940).
Mich.—Andrews v. Jackson County, 43 Mich. App. 160, 203 N.W.2d 925 (1972).

4 Ky.—Williams v. Wedding, 165 Ky. 361, 176 S.W. 1176 (1915).

5 Ky.—Kentucky River Authority v. City of Danville, 932 S.W.2d 374 (Ky. Ct. App. 1996).

6 Mich.—Kane v. Williamstown Township, 301 Mich. App. 582, 836 N.W.2d 868 (2013).

7 N.J.—Bung's Bar & Grille, Inc. v. Township Council of Florence Tp., 206 N.J. Super. 432, 502 A.2d 1198 (Law Div. 1985).

Fifth Amendment

A special assessment may not be imposed without or in excess of a special benefit to the assessed property without violating the Fifth Amendment.

Cal.—Knox v. City of Orland, 4 Cal. 4th 132, 14 Cal. Rptr. 2d 159, 841 P.2d 144 (1992).

8 Colo.—Reams v. City of Grand Junction, 676 P.2d 1189 (Colo. 1984).

Palpably punitive or arbitrary

The Fourteenth Amendment comprehends a challenge to a special tax assessment only if it is so palpably punitive or arbitrary as to confer no benefit on the landowner or forces the landowner to make an improvement that, while valuable to others, is useless to the landowner.

U.S.—Federal Deposit Ins. Corp. v. City of New Iberia, 921 F.2d 610 (5th Cir. 1991).

9 Ga.—Greene County Bd. of Com'rs v. Higdon, 277 Ga. App. 350, 626 S.E.2d 541 (2006).
Ill.—Coryn v. City of Moline, 71 Ill. 2d 194, 15 Ill. Dec. 776, 374 N.E.2d 211 (1978).
La.—City of Lafayette v. Tanner, 149 La. 430, 89 So. 314 (1921).

Storm sewer system

A city project to extend a storm sewer system was not unconstitutionally discriminatory or a denial of due process in that all residents of the city did not receive equal direct benefits, where the statute authorizing the project provided for the assessment of residents benefiting indirectly as well as directly, and all residents would benefit indirectly or directly.

Mont.—City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966).

10 Tex.—South West Property Trust, Inc. v. Dallas County Flood Control Dist. No. 1, 136 S.W.3d 1 (Tex. App. Dallas 2001), as supplemented on denial of reh'g, (Apr. 4, 2002).

11 Mich.—Charter Tp. of Oneida v. Eaton County Drain Com'r, 198 Mich. App. 523, 499 N.W.2d 390 (1993).

12 Ohio—Schiff v. City of Columbus, 9 Ohio St. 2d 31, 38 Ohio Op. 2d 94, 223 N.E.2d 54 (1967).

13 Colo.—People ex rel. Rogers v. Letford, 102 Colo. 284, 79 P.2d 274 (1938).

14 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).

15 Tex.—Cain v. City of Tyler, 261 S.W. 1018 (Tex. Comm'n App. 1924).

16 U.S.—City of Orangeburg v. Southern Ry. Co., 55 F. Supp. 171 (E.D. S.C. 1944), judgment rev'd on other grounds, 145 F.2d 725 (C.C.A. 4th Cir. 1944).

17 Conn.—Rocky Hill Inc. Dist. v. Hartford Rayon Corp., 122 Conn. 392, 190 A. 264 (1937).

18 Fla.—Anderson v. City of Ocala, 83 Fla. 344, 91 So. 182 (1921).

19 U.S.—Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 36 S. Ct. 66, 60 L. Ed. 230 (1915).

End of Document

16D C.J.S. Constitutional Law § 2190

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2190. Assessments and special taxes for public improvements—Assessments based on particular criteria

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4060

Generally, the legislature may, regardless of benefits, levy assessments according to frontage, position, area, or value, in the absence of a flagrant abuse of power.

The legislature may, in its discretion and without regard to actual benefits, levy assessments either in proportion to frontage,[1] position,[2] area,[3] or value[4] of the property which is involved in the case, without denying due process of law, provided there is no flagrant abuse of power.[5]

On the other hand, it has been considered that assessments which are confiscatory and out of all proportion to the benefits conferred violate constitutional provisions notwithstanding adherence to the front-foot rule.[6] Thus, for instance, a sanitary commission's use of the front-foot rule to compute the benefit to landowners in order to assess them for water and sewer construction was an improper taking in violation of the Due Process Clause where the landowners' tract had frontage approximately twice as wide as other lots in the subdivision.[7]

Formula recommended by traffic engineer.

Assessments to provide for and fund enlargement and construction of roads in a district, which assessments are derived from a formula recommended by a traffic engineer with a consulting company, are not arbitrary and, therefore, do not violate landowners' Fourteenth Amendment rights to substantive due process.[8]

Footnotes

1 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).
Del.—Paul Scotton Contracting Co., Inc. v. Mayor and Council of City of Dover, 314 A.2d 182 (Del. 1973).
Ky.—Daly v. Look, 267 S.W.2d 77 (Ky. 1954).
S.C.—Hagley Homeowners Ass'n, Inc. v. Hagley Water, Sewer, and Fire Authority, 326 S.C. 67, 485 S.E.2d 92 (1997); Newton v. Hanlon, 248 S.C. 251, 149 S.E.2d 606 (1966).

2 U.S.—Oregon Short Line R. Co. v. Clark County Highway Dist., 22 F.2d 681 (D. Idaho 1927).
Fla.—Richardson v. Hardee, 85 Fla. 510, 96 So. 290 (1923).

3 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).
La.—Hagmann v. City of New Orleans, 190 La. 796, 182 So. 753 (1938).
Ohio—Laskey v. Hilty, 91 Ohio App. 136, 48 Ohio Op. 272, 107 N.E.2d 899 (6th Dist. Lucas County 1951).
Okla.—St. Louis-San Francisco Ry. Co. v. City of Tulsa, 1935 OK 93, 170 Okla. 398, 41 P.2d 116 (1935).

4 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933); Hydrocarbon Production Co. v. Valley Acres Water Dist., 204 F.2d 212 (5th Cir. 1953).
N.M.—In re Arch Hurley Conservancy Dist., Hudson Irrigation Extension, 1948-NMSC-001, 52 N.M. 34, 191 P.2d 338 (1948).
Ohio—Laskey v. Hilty, 91 Ohio App. 136, 48 Ohio Op. 272, 107 N.E.2d 899 (6th Dist. Lucas County 1951).
Assessment in excess of value
The fact that the assessment will exceed the value of the property does not render it unconstitutional.
La.—State ex rel. Ideal Sav. & Homestead Ass'n v. City of New Orleans, 186 La. 705, 173 So. 179 (1937).

5 U.S.—Roberts v. Richland Irr. Dist., 289 U.S. 71, 53 S. Ct. 519, 77 L. Ed. 1038 (1933).
N.M.—Durand v. Middle Rio Grande Conservancy Dist., 1941-NMSC-041, 46 N.M. 138, 123 P.2d 389 (1941).
Tenn.—City of Nashville v. Madison Park Land Co., 155 Tenn. 382, 293 S.W. 533 (1927).

6 U.S.—City of Commerce v. Southern Ry. Co., 35 F.2d 331 (C.C.A. 5th Cir. 1929).
La.—Kansas City Southern R. Co. v. City of DeRidder, 206 So. 2d 562 (La. Ct. App. 3d Cir. 1968).
Md.—Harlan v. Town of Bel Air, 178 Md. 260, 13 A.2d 370 (1940).

7 Md.—Washington Suburban Sanitary Com'n v. Evans, 62 Md. App. 577, 490 A.2d 749 (1985).

8 Pa.—Coyne v. Town of McCandless, 764 A.2d 681 (Pa. Commw. Ct. 2000).

End of Document

16D C.J.S. Constitutional Law § 2191

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

1. Making and Financing Public Improvements

§ 2191. Public improvement bonds

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4064

The legislature may, without denying due process, provide for the issuance of bonds to pay for improvements and for the levy of assessments to pay for the bonds.

The due process requirement is not violated where a state provides for the issuance of bonds to pay for an improvement[1] and for the levy of assessments[2] in installments[3] to pay off the bonds. This rule applies provided the statute is not arbitrary or discriminatory[4] and provided that the issuance of such bonds serves a public purpose.[5]

The general principles as to notice and hearing are applied in those cases wherein a public improvement is financed by the issuance of bonds.[6] Thus, where the action taken is considered legislative in character, and not judicial, due process does not require that notice and an opportunity for a hearing be afforded.[7] As regards the scheme for repayment of bonded indebtedness, all that due process requires is that objectors to the issuance of a bond, as taxpayers, be accorded the opportunity, when their property is assessed generally, to dispute the accuracy, validity, and proportionality of such assessment.[8] While due process

does not require that persons affected have an opportunity to vote on the issuance of bonds,[9] statutes calling for elections for the issue of bonds do not violate due process.[10]

The legislature may provide that bonds for an extension of an improvement be payable by charges made for the use of the extension where the property owners have an option to use, or not to use, the improvement.[11] However, a statute which requires a county to issue bonds for the construction of township roads, or provides that the county will indorse and guarantee road bonds issued by the townships therein, violates the due process requirement,[12] as does a statute which fails to provide sufficient notice of the election on the proposition of issuing bonds.[13]

The validity of bonds issued under an authorizing statute is unaffected by a subsequent referendum of the statute since otherwise the bondholders would be deprived of property without due process of law.[14] A statute providing that the decision of a board or officer as to the validity of county bonds will be res judicata denies due process when applied to persons not parties to the proceedings to determine validity.[15]

Security for payment.

A city which elects to organize a lighting district, and to levy a special tax on abutting property for the cost, and issue bonds therefor, may, without denying due process of law, establish a special guaranty fund to secure payment of the bonds.[16] It has also been found that the right, under the state constitution and statutes, of citizens in a city economic development district to challenge a bond resolution's provisions regarding security and payment, through a sales tax increment financing plan, of the district's proposed revenue bonds, does not constitute a property interest or liberty interest which is protected by procedural due process under the Due Process Clause of the United States Constitution.[17]

Footnotes

1 Cal.—City of Dunsmuir v. Porter, 7 Cal. 2d 269, 60 P.2d 836 (1936).
Ga.—Town of McIntyre v. Scott, 191 Ga. 473, 12 S.E.2d 883 (1941).
Nev.—Washoe County Water Conservation Dist. v. Beemer, 56 Nev. 104, 45 P.2d 779 (1935).
S.C.—Wright v. Proffitt, 261 S.C. 68, 198 S.E.2d 275 (1973).
W. Va.—State ex rel. Ohio County Commission v. Samol, 165 W. Va. 714, 275 S.E.2d 2 (1980).
Refunding bonds
The refund of outstanding securities of a village issued in anticipation of the collection of a special assessment, under a statute enacted after the confirmation of the assessment, did not deprive bondholders of property without due process of law.
Ill.—Village of Bellwood v. Hunter & Co., 375 Ill. 627, 32 N.E.2d 160 (1941).
Manner of payment
A sewer improvement district act was not void for the failure to fix the manner in which bonds issued thereunder were to be paid, such matter being properly left to discretion of the board of directors of the district.
Okla.—Armstrong v. Sewer Imp. Dist. No. 1, Tulsa County, 1948 OK 198, 201 Okla. 531, 199 P.2d 1012 (1948), on reh'g, 1948 OK 261, 201 Okla. 531, 207 P.2d 917 (1949).
Substantial deviation from procedure
The issue was not whether the town council deviated from the procedures in the chapter governing procedures for issuing bonds for certain planned improvements but whether the deviation was so substantial as to deny a property owner of due process.
Fla.—Rinker Materials Corp. v. Town of Lake Park, 494 So. 2d 1123 (Fla. 1986).

2 Fla.—Utley v. City of St. Petersburg, 111 Fla. 844, 149 So. 806 (1933).

Tex.—Moore v. Maverick County Water Control and Improvement Dist. No. 1, 162 S.W.2d 1009 (Tex. Civ. App. San Antonio 1942), writ refused w.o.m., (Oct. 14, 1942).

Advance from general funds

A statute providing that, if a special assessment fund is insufficient to pay bonds for improvements and interest thereon when due, a township will pay the bonds and be reimbursed, is not unconstitutional when applied to special assessment bonds issued prior to the effective date of the statute on the ground that there would be a taking of property without due process of law.

Mich.—Hazel Park Nonpartisan Taxpayers Ass'n v. Royal Oak Tp., 317 Mich. 607, 27 N.W.2d 249 (1947).

3 Ill.—Hulbert v. City of Chicago, 213 Ill. 452, 72 N.E. 1097 (1904).

4 U.S.—Oregon Short Line R. Co. v. Clark County Highway Dist., 22 F.2d 681 (D. Idaho 1927).

Ga.—City of Dawson v. Bolton, 166 Ga. 232, 143 S.E. 119 (1928).

5 Colo.—Allardice v. Adams County, 173 Colo. 133, 476 P.2d 982 (1970).

Idaho—Board of County Com'rs of Twin Falls County v. Idaho Health Facilities Authority, 96 Idaho 498, 531 P.2d 588 (1974).

Nev.—Cauble v. Beemer, 64 Nev. 77, 177 P.2d 677 (1947).

N.C.—Turner v. City of Reidsville, 224 N.C. 42, 29 S.E.2d 211 (1944).

6 Ala.—Salmon v. Birmingham Parking Authority, 294 Ala. 226, 314 So. 2d 687 (1975).

Neb.—McCord v. Marsh, 108 Neb. 723, 189 N.W. 386 (1922).

Okla.—Oklahoma Turnpike Authority v. District Court of Lincoln County, 1950 OK 147, 203 Okla. 330, 222 P.2d 514 (1950).

Or.—Warren v. Salmon River-Grande Ronde Highway Improvement Dist., 120 Or. 408, 252 P. 562 (1927).

Notice by publication adequate

Fla.—Keys Citizens For Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So. 2d 940 (Fla. 2001).

Mich.—Harter v. City of Swartz Creek, 68 Mich. App. 403, 242 N.W.2d 792 (1976).

N.C.—Citizens Ass'n for Reasonable Growth of Washington, N. C. v. City of Washington, 45 N.C. App. 7, 262 S.E.2d 343 (1980).

Tex.—Yoakum County Water Control and Imp. Dist. No. 2 v. First State Bank, 449 S.W.2d 775 (Tex. 1969).

Utah—Salt Lake City Corp. v. Jordan River Restoration Network, 2012 UT 84, 299 P.3d 990 (Utah 2012), cert. denied, 134 S. Ct. 94, 187 L. Ed. 2d 33 (2013).

Publication insufficient

Notice to taxpayers, by publication in fine print in the back of a newspaper, was defective in its method of reaching taxpayers where the effect was to create and cut off taxpayers' right to petition for a vote on the bond issue; thus, the requirements of due process were not met.

Mich.—Alan v. Wayne County, 388 Mich. 210, 200 N.W.2d 628, 67 A.L.R.3d 1079 (1972), opinion adhered to on denial of reh'g, 388 Mich. 626, 202 N.W.2d 277 (1972).

7 Iowa—Richards v. City of Muscatine, 237 N.W.2d 48 (Iowa 1975).

Miss.—In re Validation of $7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, Dated as of Date of Delivery, 465 So. 2d 1003 (Miss. 1985).

S.C.—Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947).

8 Miss.—In re Validation of $7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, Dated as of Date of Delivery, 465 So. 2d 1003 (Miss. 1985).

9 Fla.—Utley v. City of St. Petersburg, 111 Fla. 844, 149 So. 806 (1933).

Ill.—People ex rel. Hanrahan v. Caliendo, 50 Ill. 2d 72, 277 N.E.2d 319 (1971).

Lack of protected interest

A city resident had no legitimate expectation that he would be entitled to vote on any bonds issued under a statute allowing the issuance of municipal bonds for an economic development purpose, and thus, he lacked a protected liberty or property interest upon which to base a due process claim in challenging the city's issuing economic development bonds for the purchase of a sports arena from private owners.

U.S.—Johnson v. City of Minneapolis, 152 F.3d 859 (8th Cir. 1998).

10 Ga.—Houston v. Thomas, 168 Ga. 67, 146 S.E. 908 (1929).

Persons not entitled to vote

Where a municipal election to authorize the issuance of bonds to finance five separate public improvements was held while an annexation contest was still pending, residents of the area that was in process of being

annexed to the city did not have the right to vote at a bond election, and the refusal to allow them to do so did not deny them due process.

Ark.—Tanner v. City of Little Rock, 261 Ark. 573, 550 S.W.2d 177 (1977).

11 Ill.—Spalding v. Granite City, 415 Ill. 274, 113 N.E.2d 567 (1953).

12 N.C.—Commissioners of Bladen County v. Boring, 175 N.C. 105, 95 S.E. 43 (1918).

13 Ill.—Campe v. Cermak, 330 Ill. 463, 161 N.E. 761 (1928).

14 Mont.—Lodge v. Ayers, 108 Mont. 527, 91 P.2d 691 (1939).

15 Ky.—Morgan County v. Governor of Kentucky, 288 Ky. 532, 156 S.W.2d 498 (1941).

16 Utah—Wicks v. Salt Lake City, 60 Utah 265, 208 P. 538 (1922).

17 La.—Denham Springs Economic Development Dist. v. All Taxpayers, Property Owners and Citizens of Denham Springs Economic Development Dist., 945 So. 2d 665 (La. 2006).

End of Document

16D C.J.S. Constitutional Law § 2192

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

§ 2192. Notice and opportunity to be heard in proceedings regarding public improvements, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4061, 4062

Due process of law in levying assessments or special taxes for public improvements requires notice and an opportunity to be heard as where proceedings are before an inferior tribunal and there has been no legislative determination as to the property benefited; however, it is otherwise where the legislature or some other body to which it has delegated its power has determined such fact.

Generally, before a special tax or assessment can become a fixed and permanent charge on the property of an individual, due process of law requires that he or she must have notice of it[1] and some opportunity to contest its validity and amount.[2] There is no constitutional privilege for personal notice and prior hearing in opposition to an improvement which may end in an assessment; rather, due process is satisfied if the taxpayer is provided an opportunity to present challenges and defenses to the validity of the tax levied against property for the improvement.[3] When an improvement district is not created by the legislature, and there has been no legislative determination that the property included in the district or assessed for the improvement will be benefited, it is unquestionable that property owners must have notice and an opportunity to be heard on the question of benefits.[4]

Furthermore, due process requires that interested persons be given an opportunity to be heard on all phases of the lien-creating process relating to special assessments for improvements.[5]

Such notice and opportunity to be heard are not essential, however, when the legislature itself has determined what property will be benefited or has laid down a fixed rule by which benefits may be determined.[6] Due process does not attach to a feasibility hearing with respect to a proposed improvement,[7] or to a decision to undertake substantial public improvements and to finance them via a bond issue,[8] because these are legislative functions.

Where an improvement district is organized for a general public purpose, due process does not require that a property owner therein be given notice and a hearing to determine whether such owner's property would benefit from inclusion in such district.[9] Where a political subdivision has been vested with full legislative powers concerning the creation, maintenance, and manner of funding for a public improvement, property owners in that district have no due process right to be heard on the question of the project's desirability or feasibility unless that subdivision acts ultra vires.[10] Furthermore, where a property owner is given notice and afforded a full opportunity to be heard and to present its evidence in order to test the validity of a proposed special assessment against its property, the property owner is not denied due process of law on the ground that a special benefit theoretically conferred upon his or her property does not equal the amount of the assessment.[11]

Where a city uses general funds to finance a special improvement, the failure to provide every taxpayer and resident with notice and an opportunity to protest does not violate due process.[12] Notice and hearing are not required with respect to the levy of general or ad valorem taxes.[13]

Express or implied provision.

A statute is not invalid for want of express provision for notice and hearing, if adequate provision for such is otherwise made, as by the general law, or where such a provision is necessarily implied.[14]

Effect of failure to provide.

Where required, if the right to notice and opportunity to be heard is not afforded, the proceedings may be enjoined.[15]

Waiver.

The opportunity given to property owners to object to assessments is due process, and if, after notice, they fail to appear and make objections, or to bring suit to correct or set aside the assessments, they waive irregularities therein.[16]

Footnotes

1 U.S.—Lambert v. People of the State of California, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957).
Ark.—Cypress Creek Farms v. L'Anguille Imp. Dist. No. 1, 274 Ark. 518, 626 S.W.2d 357 (1982).
N.D.—Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973).
Okla.—Bacon & Son, Inc. v. City of Tulsa, 2013 OK CIV APP 20, 297 P.3d 428 (Div. 3 2013).
Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).

2 U.S.—Saunders v. Shaw, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917).
Ark.—Cypress Creek Farms v. L'Anguille Imp. Dist. No. 1, 274 Ark. 518, 626 S.W.2d 357 (1982).

Ga.—Swiedler v. Fulton County, 247 Ga. 164, 275 S.E.2d 310 (1981).
Okla.—Bacon & Son, Inc. v. City of Tulsa, 2013 OK CIV APP 20, 297 P.3d 428 (Div. 3 2013).
Tex.—Tramel v. City of Dallas, 560 S.W.2d 426 (Tex. Civ. App. Beaumont 1977), writ refused n.r.e., (Mar. 29, 1978).

Time between hearing and notice

Inasmuch as a statute establishing the underground conversion of a utilities district did not prohibit or deny reasonable notice to affected individuals, and it could be inferred from the requirement of how notice was to be given that it would be given in sufficient time to afford those affected an opportunity to be present, the legislation did not violate due process.

Utah—Wagner v. Salt Lake City, 29 Utah 2d 42, 504 P.2d 1007 (1972).

3 Kan.—Boeing Co. v. Oaklawn Imp. Dist., 255 Kan. 848, 877 P.2d 967 (1994).

4 U.S.—Browning v. Hooper, 269 U.S. 396, 46 S. Ct. 141, 70 L. Ed. 330 (1926); Beck v. Missouri Valley Drainage Dist of Holt County, Mo, 46 F.2d 632, 84 A.L.R. 1089 (C.C.A. 8th Cir. 1931).
Fla.—Lersch v. Board of Public Instruction for Orange County, 121 Fla. 621, 164 So. 281 (1935).
Kan.—Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson, 166 Kan. 78, 200 P.2d 299 (1948).

5 Ariz.—Estate of Crain v. City of Williams, 192 Ariz. 342, 965 P.2d 76 (Ct. App. Div. 1 1998).

6 U.S.—Browning v. Hooper, 269 U.S. 396, 46 S. Ct. 141, 70 L. Ed. 330 (1926).
Tex.—City of Houston v. Fore, 412 S.W.2d 35 (Tex. 1967).
W. Va.—La Follette v. City of Fairmont, 138 W. Va. 517, 76 S.E.2d 572 (1953).

Assessments fixed on area basis

When assessments are fixed on an area basis, involving merely mathematical computation, no notice or hearing is required.

U.S.—Hancock v. City of Muskogee, Okl., 250 U.S. 454, 39 S. Ct. 528, 63 L. Ed. 1081 (1919).
N.M.—Davy v. McNeill, 1925-NMSC-040, 31 N.M. 7, 240 P. 482 (1925).

7 Minn.—Blankenburg v. City of Northfield, 462 N.W.2d 417 (Minn. Ct. App. 1990).

8 Miss.—In re Validation of $7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, Dated as of Date of Delivery, 465 So. 2d 1003 (Miss. 1985).

9 Ill.—People ex rel. Hanrahan v. Caliendo, 50 Ill. 2d 72, 277 N.E.2d 319 (1971).

10 Miss.—In re Validation of $7,800,000 Combined Utility System Revenue Bond, Gautier Utility Dist., Jackson County, Dated as of Date of Delivery, 465 So. 2d 1003 (Miss. 1985).

11 Colo.—Orchard Court Development Co. v. City of Boulder, 182 Colo. 361, 513 P.2d 199 (1973).

12 Utah—Dawson v. Swapp, 26 Utah 2d 250, 487 P.2d 1288 (1971).

13 U.S.—Pacific Gas & Electric Co. v. Sacramento Municipal Utility Dist., 92 F.2d 365 (C.C.A. 9th Cir. 1937).
Cal.—American Co. v. City of Lakeport, 220 Cal. 548, 32 P.2d 622 (1934).
S.C.—Smith v. Robertson, 210 S.C. 99, 41 S.E.2d 631 (1947).

14 U.S.—Paulsen v. City of Portland, 149 U.S. 30, 13 S. Ct. 750, 37 L. Ed. 637 (1893).
Kan.—Cow Creek Valley Flood Prevention Ass'n v. City of Hutchinson, 166 Kan. 78, 200 P.2d 299 (1948).
Wis.—Armory Realty Co. v. Olsen, 210 Wis. 281, 246 N.W. 513 (1933).

15 U.S.—Connor v. Board of Com'rs of Logan County, Ohio, 12 F.2d 789 (S.D. Ohio 1926).
Ky.—Board of Levee Com'rs of Fulton County v. Johnson, 178 Ky. 287, 199 S.W. 8 (1917).

16 U.S.—Campbell v. City of Olney, 262 U.S. 352, 43 S. Ct. 559, 67 L. Ed. 1021 (1923); Kasper v. Larson, 372 F. Supp. 881 (E.D. Wis. 1974).

End of Document

16D C.J.S. Constitutional Law § 2193

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

§ 2193. Sufficiency of notice in proceedings regarding public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4061

The requirement of due process is satisfied if notice is given at any time before the assessment becomes a charge on the property if otherwise sufficient and in compliance with the statute.

The constitutional requirement of due process is satisfied by provision for reasonable notice at any stage of the proceedings before the tax or assessment becomes an absolute and final charge on the property,[1] and notice will be considered sufficient if it fairly apprises landowners of what is proposed and affords a reasonable opportunity to be heard.[2] However, it is not necessary that the owner should have notice of every stage of the proceedings.[3]

Notice of a hearing on preliminary matters, or matters not involving a determination as to the validity of an assessment,[4] including the determination as to the necessity or wisdom of the improvement and whether it should be undertaken,[5] is not necessary in order to constitute due process of law. Thus, due process does not entitle a property owner to notice and a hearing on the decisions leading up to an assessment.[6] A statute which provides for notice of the assessment only by providing for notice of proceedings to enforce the assessment has been held valid.[7]

Form of notice.

No particular form of notice is required.[8]

CUMULATIVE SUPPLEMENT

Cases:

City's alleged failure to give required statutory notice of the full extent of proposed street improvements to landowners, whose properties were liable to be specially assessed for the improvements, did not violate the landowners' due process rights; city's decision to create assessment district and make improvements did not deprive landowners of property rights, any violation of statutory notice requirements was purely statutory violation, and landowners did not argue that they did not receive notice and opportunity to be heard before assessments became final. U.S. Const. Amend. 14; N.D. Const. art. 1, § 12; NDCC § 40-22-15. Paving District 476 Group v. City of Minot, 2017 ND 176, 898 N.W.2d 418 (N.D. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Mt. St. Mary's Cemetery Ass'n v. Mullins, 248 U.S. 501, 39 S. Ct. 173, 63 L. Ed. 383 (1919); Johnson & Wimsatt v. Hazen, 99 F.2d 384 (App. D.C. 1938).
Fla.—City of New Smyrna v. Certain Lands Upon Which Special Assessments Are Delinquent, 128 Fla. 543, 176 So. 57 (1937).
Neb.—Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).
N.D.—Serenko v. City of Wilton, 1999 ND 88, 593 N.W.2d 368 (N.D. 1999).

2 U.S.—Chicago, M., St. P. & P.R. Co. v. Risty, 276 U.S. 567, 48 S. Ct. 396, 72 L. Ed. 703 (1928).
Test of sufficiency
In passing on the sufficiency of notice to property owners of an assessment of benefits to constitute due process of law, an act is tested by consideration of the shortest time under which notice could be given pursuant to the requirements.
Ark.—House v. Road Imp. Dist. No. 2, Conway County, 158 Ark. 330, 251 S.W. 12 (1923).
Notice sufficient
The annual assessment on property owners in a business improvement district for a municipal sports stadium did not violate due process where the owners had notice of the hearing on the creation of the district, the owners had notice of the maximum amount of benefit estimated to be conferred on each tract, the owners had notice of the preliminary basis for estimating the assessment, and the owners had the opportunity to raise their objections to the amount to be assessed to their tracts at the hearing.
Okla.—Bacon & Son, Inc. v. City of Tulsa, 2013 OK CIV APP 20, 297 P.3d 428 (Div. 3 2013).
Notice insufficient
(1) Where the board of public works of a city adopted a resolution describing the property to be charged for a street improvement, but its ordinance of intention which was published and posted failed to describe any property to be charged, and contained no hint that the property would be charged other than that chargeable under the front foot rule, such notice was insufficient as due process as affecting the property which did not front on the improvement.
Cal.—Flynn v. Chiappari, 191 Cal. 139, 215 P. 682 (1923).
(2) A statute describing procedures for foreclosing on delinquent irrigation assessments was unconstitutional by failing to require that the owner of property subject to an irrigation assessment foreclosure be notified

of foreclosure proceedings by personal service or mail, thereby failing to provide for the notice required by due process.

Wash.—Wenatchee Reclamation Dist. v. Mustell, 102 Wash. 2d 721, 684 P.2d 1275 (1984), opinion modified on other grounds, (Oct. 9, 1984).

3 U.S.—Beck v. Missouri Valley Drainage Dist of Holt County, Mo, 46 F.2d 632, 84 A.L.R. 1089 (C.C.A. 8th Cir. 1931).

Neb.—Burgess-Nash Bldg. Co. v. City of Omaha, 116 Neb. 862, 219 N.W. 394 (1928).

Utah—Elkins v. Millard County Drainage Dist. No. 3, 77 Utah 303, 294 P. 307 (1930).

Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).

4 U.S.—Chicago, M., St. P. & P.R. Co. v. Risty, 276 U.S. 567, 48 S. Ct. 396, 72 L. Ed. 703 (1928).

Iowa—Ward v. Board of Sup'rs of Pottawattamie County, 214 Iowa 1162, 241 N.W. 26 (1932).

Minn.—Blankenburg v. City of Northfield, 462 N.W.2d 417 (Minn. Ct. App. 1990) (feasibility hearing on proposed improvement).

Miss.—City of Lexington v. Wilson's Estate, 170 Miss. 282, 151 So. 164 (1933).

Intention to make improvement

Regarding due process, a property owner need not be notified of a municipality's intention to make improvements, nor of preliminary resolutions.

Fla.—Escott v. City of Miami, 107 Fla. 273, 144 So. 397 (1932).

Enactment of statute

Assessment on a particular property is not rendered void by the failure to give notice to the owner before enactment of a statute or ordinance providing for the construction of an improvement.

Cal.—Ferry v. Marr, 188 Cal. 798, 206 P. 454 (1922).

5 U.S.—Chicago, M., St. P. & P.R. Co. v. Risty, 276 U.S. 567, 48 S. Ct. 396, 72 L. Ed. 703 (1928).

Ga.—City of Valdosta v. Harris, 156 Ga. 490, 119 S.E. 625 (1923).

6 Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).

7 Del.—Riley v. Banks, 44 Del. 489, 62 A.2d 229 (Super. Ct. 1948).

8 Cal.—Imperial Water Co. No. 1 v. Board of Sup'rs of Imperial County, 162 Cal. 14, 120 P. 780 (1912).

End of Document

16D C.J.S. Constitutional Law § 2194

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

2. Notice and Opportunity to Be Heard in Proceedings Regarding Public Improvements

§ 2194. Manner of giving notice in proceedings regarding public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4061

Notice is sufficient if made in an appropriate manner prescribed by law, such as by publication, posting, or mailing.

The notice is sufficient if made in an appropriate manner prescribed by law for such assessment or special tax cases.[1] Personal notice is not required.[2] The notice may be given by publication,[3] or posting,[4] or by mail,[5] or by publication and posting,[6] or publication and mailing.[7]

In some cases, however, notice by publication may not be sufficient to satisfy due process.[8] Thus, a town's notice by publication of a proposed special assessment resulted in a violation of the due process rights of a nonresident partnership which owned substantial vacant land in the district subject to the assessment, and no compelling reason existed why the town could not have given actual notice to the affected landowners, whose names and addresses were known.[9]

It has also been found that notice by publication under a statute which provides for notice by publication in lieu of mailing conforms to due process only when an affected person's address for mailing purposes is unknown and cannot be ascertained

with reasonable diligence.[10] A statute which provides only for constructive notice by publication to nonabutting owners of a section of a highway which is to be abandoned as contrasted to personal notice to abutting owners does not deny due process to such nonabutting owners.[11]

Frequency of notice.

A requirement of one insertion of the notice in a newspaper has been found insufficient[12] although two successive insertions in a paper of general circulation in a county in which a proposed water improvement district is located has satisfied due process of law.[13] A requirement of publication for four weeks in a weekly newspaper is satisfied if the last publication is made before the time set for the hearing.[14]

Subject matter.

A notice of a public meeting reflecting an agenda item of "amend rate order" has been held sufficient to give reasonable notice of the subject matter of topics to be considered and not to violate due process.[15]

Footnotes

1 Cal.—Coleman v. Spring Const. Co., 41 Cal. App. 201, 182 P. 473 (1st Dist. 1919).
Totality of circumstances
Although constructive notice by newspaper publication did not alone satisfy the standards of due process in respect to special assessments and resultant liens, the totality of the circumstances in the case, including a mailed copy of the city council resolution, a brochure, public meetings, and the property owners' actual knowledge constituted notice and an opportunity to be heard sufficient to satisfy the requirements of due process.
Del.—Paul Scotton Contracting Co., Inc. v. Mayor and Council of City of Dover, 314 A.2d 182 (Del. 1973).

2 U.S.—Wimberly v. Cowan Inv. Corporation, 80 F.2d 452 (C.C.A. 5th Cir. 1935).
Kan.—Boeing Co. v. Oaklawn Imp. Dist., 255 Kan. 848, 877 P.2d 967 (1994).
N.D.—Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973).
Pa.—In re Condemnation by Com., Dept. of Transp., of Right of Way, for Legislative Route 201, Section 5R/W, 22 Pa. Commw. 440, 349 A.2d 819 (1975).

3 U.S.—Fidelity Nat. Bank & Trust Co. of Kansas City v. Swope, 274 U.S. 123, 47 S. Ct. 511, 71 L. Ed. 959 (1927).
Ark.—Cypress Creek Farms v. L'Anguille Imp. Dist. No. 1, 274 Ark. 518, 626 S.W.2d 357 (1982).
Cal.—Erven v. Board of Supervisors, 53 Cal. App. 3d 1004, 126 Cal. Rptr. 285 (4th Dist. 1975).
Colo.—Satter v. City of Littleton, 185 Colo. 90, 522 P.2d 95 (1974).
Kan.—Dodson v. City of Ulysses, 219 Kan. 418, 549 P.2d 430 (1976).
N.D.—Patterson v. City of Bismarck, 212 N.W.2d 374 (N.D. 1973).
Notice of meetings to make blight determinations
Okla.—City of Midwest City v. House of Realty, Inc., 2008 OK 28, 198 P.3d 886 (Okla. 2008).

4 Cal.—Coleman v. Spring Const. Co., 41 Cal. App. 201, 182 P. 473 (1st Dist. 1919).
Or.—Drainage District No. 7 of Washington County v. Bernards, 89 Or. 531, 174 P. 1167 (1918).

5 Ga.—Lewis v. Chapman, 147 Ga. 408, 94 S.E. 249 (1917).
Wash.—Tiffany Family Trust Corp. v. City of Kent, 155 Wash. 2d 225, 119 P.3d 325 (2005).
Failure to notify all owners of record
Despite the fact that a county sent some notices of creation of a special service area and the issuance of bonds to be retired to financial institutions which were presumably mortgagees without any cross-reference to the

owners of record, and despite the fact that a number of notices sent may have fallen short of the number of owners of record, the notice afforded was sufficient to pass due process muster.

Ill.—Andrews v. Madison County, 54 Ill. App. 3d 343, 12 Ill. Dec. 35, 369 N.E.2d 532 (5th Dist. 1977).

6 U.S.—Johnson v. Peterson, 288 F. 735 (C.C.A. 8th Cir. 1923).

Ill.—Hoehamer v. Village of Elmwood Park, 361 Ill. 422, 198 N.E. 345, 102 A.L.R. 196 (1935).

Tex.—Yoakum County Water Control and Imp. Dist. No. 2 v. First State Bank, 433 S.W.2d 200 (Tex. Civ. App. Tyler 1968), writ granted, (May 14, 1969) and judgment aff'd, 449 S.W.2d 775 (Tex. 1969).

7 Ark.—Fulmer v. Board of Com'rs, Water Imp. Dist. No. 5, 286 Ark. 419, 692 S.W.2d 246 (1985).

Ky.—Handley v. Graham, 187 Ky. 316, 219 S.W. 417 (1920).

S.C.—Newton v. Hanlon, 248 S.C. 251, 149 S.E.2d 606 (1966).

Publication sufficient

Where a statute provided for publication and mailing, but provided that the failure to mail notice should not invalidate the proceedings, publication alone satisfied the requirement of due process.

N.J.—River Edge Homes v. Borough of River Edge, Bergen County, 130 N.J.L. 376, 33 A.2d 106 (N.J. Sup. Ct. 1943).

8 Minn.—Application of Christenson, 417 N.W.2d 607 (Minn. 1987).

Wis.—Wisconsin Elec. Power Co. v. City of Milwaukee, 275 Wis. 121, 81 N.W.2d 298 (1957).

9 N.Y.—Garden Homes Woodlands Co. v. Town of Dover, 95 N.Y.2d 516, 720 N.Y.S.2d 79, 742 N.E.2d 593 (2000).

10 Cal.—Atkins v. Kessler, 97 Cal. App. 3d 784, 159 Cal. Rptr. 231 (2d Dist. 1979).

Ind.—Fritz v. Board of Trustees of Town of Clermont, 253 Ind. 202, 252 N.E.2d 567 (1969).

11 R.I.—D'Agostino v. Doorley, 118 R.I. 700, 375 A.2d 948 (1977).

12 Ark.—Ritter v. Drainage Dist. No. 1, Poinsett County, 78 Ark. 580, 94 S.W. 711 (1906).

13 Okla.—Lowery v. Water Imp. Dist. No. 5, Tulsa County, 1926 OK 1020, 122 Okla. 116, 251 P. 748 (1926).

14 Mo.—State ex rel. Coleman v. Blair, 245 Mo. 680, 151 S.W. 148 (1912).

15 Tex.—Bay Ridge Utility Dist. v. 4M Laundry, 717 S.W.2d 92 (Tex. App. Houston 1st Dist. 1986), writ refused n.r.e., (Nov. 5, 1986).

End of Document

16D C.J.S. Constitutional Law § 2195

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

2. Notice and Opportunity to Be Heard in Proceedings Regarding Public Improvements

§ 2195. Sufficiency of opportunity for hearing in proceedings regarding public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4061

The requirement of due process is satisfied if any opportunity is afforded the landowner to be heard before the assessment becomes a final charge on the property, or even afterward in a judicial proceeding to enforce the assessment, or in a suit by the landowner to enjoin the collection thereof.

The constitutional guaranty of due process of law is complied with where a person whose property is assessed for local improvements is given an opportunity for a hearing as to the validity and amount of the assessment at any time before it becomes a final charge on the property;[1] or even afterward, in proceedings to enforce the assessment,[2] provided such proceeding is a judicial proceeding and due notice thereof is given to the owner of the property with full opportunity to be heard;[3] or in proceedings by the landowner to enjoin collection of the assessments, and to recover them back when collected.[4] Due process does not require a perfect hearing in connection with a proposed special assessment levy but, rather, requires that there be an orderly process whereby persons affected can object to the project, estimated costs thereof, method of financing, and general amount of the assessments.[5]

There is no constitutional privilege to be heard in opposition at the launching of a public improvement which may end in special assessments,[6] and the opportunity for a hearing is not a condition precedent to a valid determination of preliminary matters,[7] such as the necessity or wisdom of the improvement,[8] the creation and establishment of boundaries of the taxing district,[9] or the basis on which the assessment is to be levied.[10] A town does not deprive a property owner of due process by failing to provide a hearing before it removes debris from the property and charges expenses incurred as an assessment upon the property where the town has given the owner 30 days' notice that the debris has to be removed and of the consequences of the failure to do so.[11]

One owner is not entitled to a hearing as to the amount of an assessment which has been made on the property of another owner within the district and which has been paid by the person assessed.[12] Where the right to contest an assessment is provided by statute, the setting of the hearing after the assessment is made does not violate the constitutional guaranty.[13] One hearing is sufficient to constitute due process,[14] and the State may select the tribunal before which the hearing will be had.[15]

Due process does not require a hearing in a court,[16] but the requirement is satisfied by a hearing before an administrative body,[17] such as a municipal council,[18] or board of commissioners,[19] or appraisers,[20] whose decision may be made final.[21]

There is no want of due process because the statute denies or limits the right of appeal if the party whose land is assessed is afforded an opportunity for a hearing.[22] Thus, where the statute provides that a person aggrieved by the action of the assessors may, within a designated period, apply to a court to have the assessment set aside or corrected, there is no want of due process even though no provision is made for an appeal.[23] In addition, it is not essential to due process that the property owner be given a right of appeal from the decision of a trial court with respect to the assessment.[24] On the other hand, a city charter which fails to provide for notice to the taxpayer or to afford a hearing before the assessors violates due process although the ordinance relating to the assessment provides for a hearing before the municipal council.[25]

A landowner is not denied due process although a board of equalization which hears complaints as to assessments can only suggest and recommend alterations.[26] A mere opportunity to file objections in writing is not, however, a sufficient hearing,[27] and the property owner must be accorded the right to introduce evidence and to be heard in person or by counsel.[28] However, a hearing in connection with the creation of a special assessment district need not be in the nature of a full trial; rather, due process is satisfied by a hearing at which all interested parties may present evidence and arguments to insure that the varying public interest has been considered in reaching the decision and to protect the public against arbitrary governmental action.[29]

Where the notice of assessment is insufficient to constitute due process, the fact that the ordinance authorizing the improvement provides for appeals by the landowners and for a hearing thereon does not cure the defect, since an opportunity to appeal is of no value to a property owner who, because of insufficient notice, has never had an opportunity for a hearing in the first instance.[30] Thus, where the assessment roll fails to name the owner of property assessed or to describe the property, the defects are jurisdictional, and a statutory provision for an appeal within a specified time as an exclusive means of attacking the assessment denies due process.[31]

Imposing condition precedent.

Payment of an amount admitted to be due may be made a condition precedent to the right of a landowner to contest an assessment by a proceeding for an injunction.[32] In addition, a statute requiring the filing of a bond for costs as a prerequisite to an appeal from the decision of an administrative board does not deny due process.[33]

Footnotes

1 U.S.—Georgia Railway & Elec. Co. v. City of Decatur, 297 U.S. 620, 56 S. Ct. 606, 80 L. Ed. 925 (1936).
Kan.—Dodson v. City of Ulysses, 219 Kan. 418, 549 P.2d 430 (1976).
Md.—Murphy v. Montgomery County, 267 Md. 224, 297 A.2d 249 (1972).
Nev.—Ames v. City of North Las Vegas, 83 Nev. 510, 435 P.2d 202 (1967).
N.D.—Serenko v. City of Wilton, 1999 ND 88, 593 N.W.2d 368 (N.D. 1999).
Public hearings
Public hearings held with regard to whether a town should undertake sewer construction, in response to a court order to abate water pollution, were not meaningless so as to deprive property owners of their rights to due process of law where each individual owner was granted an assessment hearing before the water pollution control authority concerning the proposed assessment.
Conn.—Cyr v. Town of Coventry, 216 Conn. 436, 582 A.2d 452 (1990).

2 U.S.—Utley v. City of St. Petersburg, Fla., 292 U.S. 106, 54 S. Ct. 593, 78 L. Ed. 1155 (1934).
Del.—Riley v. Banks, 44 Del. 489, 62 A.2d 229 (Super. Ct. 1948).
Fla.—McCann v. City of St. Petersburg, 145 Fla. 158, 199 So. 264 (1940).

3 U.S.—Hetrick v. Village of Lindsey, Ohio, 265 U.S. 384, 44 S. Ct. 486, 68 L. Ed. 1065 (1924).
Fla.—Baynard v. City of St. Petersburg, 130 Fla. 471, 178 So. 150 (1938).
Mo.—City of Salisbury, to Use of Rafter v. Schooler, 331 Mo. 291, 53 S.W.2d 267, 84 A.L.R. 1153 (1932).

4 U.S.—Hetrick v. Village of Lindsey, Ohio, 265 U.S. 384, 44 S. Ct. 486, 68 L. Ed. 1065 (1924).

5 U.S.—Cox v. Norton, 797 F.2d 329 (6th Cir. 1986).

6 U.S.—Utley v. City of St. Petersburg, Fla., 292 U.S. 106, 54 S. Ct. 593, 78 L. Ed. 1155 (1934).
Kan.—Dodson v. City of Ulysses, 219 Kan. 418, 549 P.2d 430 (1976).
Okla.—Horton v. City of Oklahoma City, 1977 OK 87, 566 P.2d 431 (Okla. 1977).
Or.—Brown v. City of Salem, 251 Or. 150, 444 P.2d 936 (1968).

7 U.S.—Beck v. Missouri Valley Drainage Dist of Holt County, Mo, 46 F.2d 632, 84 A.L.R. 1089 (C.C.A. 8th Cir. 1931).
Ga.—City of Valdosta v. Harris, 156 Ga. 490, 119 S.E. 625 (1923).
Wash.—Carlisle v. Columbia Irr. Dist., 168 Wash. 2d 555, 229 P.3d 761 (2010).
Legislative restrictions
If the legislature sees fit to grant a hearing on this question, it may impose such restrictions as it sees fit.
Mo.—State ex rel. Gentry v. Curtis, 319 Mo. 316, 4 S.W.2d 467 (1928).

8 U.S.—Beck v. Missouri Valley Drainage Dist of Holt County, Mo, 46 F.2d 632, 84 A.L.R. 1089 (C.C.A. 8th Cir. 1931).
Cal.—Erven v. Board of Supervisors, 53 Cal. App. 3d 1004, 126 Cal. Rptr. 285 (4th Dist. 1975).
Ga.—Baugh v. City of La Grange, 161 Ga. 80, 130 S.E. 69 (1925).
Mo.—Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780, 52 A.L.R. 879 (1927).

9 U.S.—Beck v. Missouri Valley Drainage Dist of Holt County, Mo, 46 F.2d 632, 84 A.L.R. 1089 (C.C.A. 8th Cir. 1931).
Colo.—People ex rel. Setters v. Lee, 72 Colo. 598, 213 P. 583 (1923).
Mo.—Mudd v. Wehmeyer, 323 Mo. 704, 19 S.W.2d 891 (1929).

10 U.S.—French v. Barber Asphalt Pav. Co., 181 U.S. 324, 21 S. Ct. 625, 45 L. Ed. 879 (1901).

11 N.Y.—Sumkin v. Town of Babylon, 238 A.D.2d 430, 656 N.Y.S.2d 364 (2d Dep't 1997).

12 U.S.—St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419, 36 S. Ct. 647, 60 L. Ed. 1072 (1916).

13 Tex.—Beatty v. Panhandle Const. Co., 275 S.W. 716 (Tex. Civ. App. Amarillo 1925), writ refused, (Nov. 25, 1925).

14 Ky.—Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W. 13 (1924).
Mich.—Gaut v. City of Southfield, 34 Mich. App. 646, 192 N.W.2d 123 (1971), judgment aff'd, 388 Mich. 189, 200 N.W.2d 76 (1972).
Multiple hearings
The due process rights of property owners were not violated by a statutory lien-creating process for special assessment liens, as the property owners had the opportunity to be heard at two hearings before and one hearing after the recording of the liens, though the postlien hearing occurred 15 months after the recording.

Ariz.—Estate of Crain v. City of Williams, 192 Ariz. 342, 965 P.2d 76 (Ct. App. Div. 1 1998).

15 Ky.—Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W. 13 (1924).

16 Cal.—Crawford v. Los Angeles County, 128 Cal. App. 368, 17 P.2d 1017 (1st Dist. 1932).

Mich.—In re Project Cost & Special Assessment Roll for Chappel Dam, 282 Mich. App. 142, 762 N.W.2d 192 (2009).

17 Ind.—Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N.E. 496 (1914).

18 Cal.—Howard Park Co. v. City of Los Angeles, 119 Cal. App. 2d 515, 259 P.2d 977 (2d Dist. 1953).

Mo.—Giers Imp. Corp. v. Investment Service, 361 Mo. 504, 235 S.W.2d 355 (1950).

Judicial review of ordinance creating district if passed

Where a statute authorized a town to organize an improvement district, and the statute required a hearing before the governing body of the town before passage of the ordinance creating the district, and authorized judicial review of the validity of the ordinance creating the district if passed, the statute was not unconstitutional as violating the due process of law clause of the state constitution because not providing for a court hearing prior to the organization of the district.

Colo.—Anderson v. Town of Westminster, 125 Colo. 408, 244 P.2d 371 (1952).

19 Cal.—Crawford v. Los Angeles County, 128 Cal. App. 368, 17 P.2d 1017 (1st Dist. 1932).

20 Ind.—Bemis v. Guirl Drainage Co., 182 Ind. 36, 105 N.E. 496 (1914).

21 Wash.—Oregon-Washington R. & Nav. Co. v. Board of Com'rs of Yakima County, 103 Wash. 480, 175 P. 37 (1918).

22 Idaho—Bell v. City of Moscow, 48 Idaho 65, 279 P. 1095 (1929).

N.M.—In re Proposed Middle Rio Grande Conservancy Dist., 1925-NMSC-058, 31 N.M. 188, 242 P. 683 (1925).

Utah—Tygesen v. Magna Water Co., 119 Utah 274, 226 P.2d 127 (1950).

23 Ark.—Cherokee Village Homeowners Protective Ass'n v. Cherokee Village Road and St. Imp. Dist. No. 1, 248 Ark. 1055, 455 S.W.2d 93 (1970).

Colo.—Oberst v. Mays, 148 Colo. 285, 365 P.2d 902 (1961).

24 Ill.—Material Service Co. v. Village of Elmwood Park, 355 Ill. 558, 189 N.E. 872 (1934).

25 Ga.—Swinson v. City of Dublin, 178 Ga. 323, 173 S.E. 93 (1934).

26 U.S.—Farncomb v. City and County of Denver, 252 U.S. 7, 40 S. Ct. 271, 64 L. Ed. 424 (1920).

27 U.S.—Londoner v. City and County of Denver, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908).

28 U.S.—Georgia Ry. & Elec. Co. v. City of Decatur, 295 U.S. 165, 55 S. Ct. 701, 79 L. Ed. 1365 (1935).

Cal.—Miller & Lux v. Board of Sup'rs of Madera County, 189 Cal. 254, 208 P. 304 (1922).

Ky.—Shaw v. City of Mayfield, 204 Ky. 618, 265 S.W. 13 (1924).

Refusal to hear evidence

A board of equalization's refusal to consider property owners' objections to special assessments on the theory that an assessment by area was conclusive, regardless of special benefits accruing, was a denial of due process.

Colo.—Santa Fe Land Imp. Co. v. City and County of Denver, 89 Colo. 309, 2 P.2d 238 (1931).

29 Mich.—Matter of Van Ettan Lake, 149 Mich. App. 517, 386 N.W.2d 572 (1986).

30 Cal.—Flynn v. Chiappari, 191 Cal. 139, 215 P. 682 (1923).

31 Idaho—Western Loan & Building Co. v. Bandel, 57 Idaho 101, 63 P.2d 159 (1936).

32 Ga.—Lanham & Sons Co. v. City of Rome, 136 Ga. 398, 71 S.E. 770 (1911).

33 Neb.—Nebraska Mid-State Reclamation Dist. v. Hall County, 152 Neb. 410, 41 N.W.2d 397 (1950).

End of Document

16D C.J.S. Constitutional Law § 2196

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

3. Enforcement of Assessments for Public Improvements; Liability

§ 2196. Manner of enforcing assessments for public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4065

Due process of law must be observed in the enforcement of assessments.

In order to enforce the payment of assessments, it is competent for the legislature, without denying due process of law, to provide that they will constitute liens on the lands on which they are levied,[1] and that such lien will be given priority over other liens,[2] or will be concurrent with general tax liens.[3] A statute fixing the lien at a date prior to the hearing on benefits does not take property without due process, the owner's right to defeat the assessment on such hearing remaining unimpaired.[4]

There is no denial of due process by provisions in the statute that if the assessments are not paid at maturity an additional penalty will accrue[5] and that the lands may be sold and the assessments paid from the proceeds.[6] It is likewise not a denial of due process to provide for the recovery of attorney's fees in an action to foreclose the lien.[7] A statute providing for a sale of drainage district lands on application, and for notice of sale, is not unconstitutional for want of notice on application;[8] and a provision that drainage taxes will have the force and effect of a judgment and execution at law against the property owner is inoperative to deprive persons of property without due process of law and may be eliminated.[9]

The legislature may regulate the procedure for the making and enforcement of assessments.[10] For example, the legislature may make the report of the commissioners in condemnation proceedings prima facie evidence,[11] and the extension of time of unpaid assessments does not deprive bondholders of due process of law.[12] However, a statute describing procedures for foreclosing on delinquent assessments is unconstitutional by failing to require that the owner of the property subject to an assessment foreclosure be notified of foreclosure proceedings by personal service or mail, thereby failing to provide for the notice required by due process.[13]

Attachment.

An assessment for public improvements may be enforced by attachment of the assessed property.[14]

Waiver of defenses.

The exercise by the owner of an option to pay his or her assessment by installments may be given the effect of a waiver of defenses to the assessment,[15] and a defense once waived may not be taken advantage of thereafter.[16]

Footnotes

1 U.S.—Sager v. Burgess, 350 F. Supp. 1310 (E.D. Pa. 1972), judgment aff'd, 411 U.S. 941, 93 S. Ct. 1923, 36 L. Ed. 2d 406 (1973).
R.I.—Bionomic Church of Rhode Island v. Ruscetta, 424 A.2d 1063 (R.I. 1981).
Pa.—Upper Gwynedd Tp. Authority v. Roth, 113 Pa. Commw. 239, 536 A.2d 875 (1988).
Issue of tax bills
A statute authorizing the issue of tax bills to pay for special improvements is not unconstitutional as a deprivation of property without due process.
Kan.—State v. Kansas City, 125 Kan. 88, 262 P. 1032 (1928).

2 Tex.—Farmers' State Bank of Burkburnett v. McReynolds, 1 S.W.2d 322 (Tex. Civ. App. Amarillo 1927).
Prior vendor's lien
An ordinance making a paving lien superior to a vendor's lien acquired before the acceptance of a city charter and a paving law was held not to take property without due process of law.
Tex.—Marriott v. Corder, 4 S.W.2d 213 (Tex. Civ. App. Fort Worth 1927), writ refused, (June 6, 1928).

3 Kan.—Board of Com'rs of Wyandotte County v. Adams, 155 Kan. 160, 123 P.2d 818 (1942).

4 Tex.—Anderson v. Brandon, 121 Tex. 188, 47 S.W.2d 261 (1932).

5 Ill.—Metropolitan Sanitary Dist. of Greater Chicago v. On-Cor Frozen Foods, Inc., 36 Ill. App. 3d 239, 343 N.E.2d 577 (1st Dist. 1976).
Mo.—St. Francis Levee Dist. v. Dorroh, 316 Mo. 398, 289 S.W. 925 (1926).
Okla.—Shultz v. Ritterbusch, 1913 OK 462, 38 Okla. 478, 134 P. 961 (1913), dismissed, 232 U.S. 719, 34 S. Ct. 601, 58 L. Ed. 813 (1914).

6 Ala.—Billingsley v. Wallace, 292 Ala. 538, 297 So. 2d 362 (1974).
Proceeds of sale
Where a delinquent installment of a street improvement assessment was collected by the county treasurer as other delinquent taxes were collected, and proper statutory procedure was followed, by prorating the proceeds between an ad valorem tax and a delinquent assessment installment, due process of law was had in collection of the installment, bondholders had no further lien on the lot sold, and the installment was legally extinguished.
U.S.—Town of Okeene, Okl., ex rel. Burgard v. Kratz, 45 F. Supp. 629 (W.D. Okla. 1942).
Validity of deed

Under a statute providing that the holder of a certificate of sale under a street improvement bond must serve written notice on the owner before expiration of the time of redemption or before the date of application for a deed, and a statute providing that any action contesting the validity of a deed must be brought within six months after issuance of the deed, the failure to give the record owner proper notice of an application for a deed did not deprive him of his property without due process of law.

Cal.—Elbert, Limited v. Gross, 41 Cal. 2d 322, 260 P.2d 35 (1953).

7 Ind.—Pittsburgh, C., C. & St. L. Ry. Co. v. Schmuck, 181 Ind. 323, 103 N.E. 325 (1913).

Ky.—Daly v. Look, 267 S.W.2d 77 (Ky. 1954).

Tex.—Sullivan v. Roach-Manigan Paving Co. of Texas, 220 S.W. 444 (Tex. Civ. App. San Antonio 1920), writ dismissed, (Oct. 4, 1920).

8 Wis.—In re Dancy Drainage Dist., 199 Wis. 85, 225 N.W. 873 (1929).

9 Fla.—Martin v. Dade Muck Land Co., 95 Fla. 530, 116 So. 449 (1928).

10 Miss.—Bobo v. Board of Levee Com'rs for Yazoo-Mississippi Delta, 92 Miss. 792, 46 So. 819 (1908).

11 Ill.—Chicago Terminal Transfer R. Co. v. City of Chicago, 217 Ill. 343, 75 N.E. 499 (1905).

12 Ill.—Village of Bellwood v. Hunter & Co., 375 Ill. 627, 32 N.E.2d 160 (1941).

13 Wash.—Wenatchee Reclamation Dist. v. Mustell, 102 Wash. 2d 721, 684 P.2d 1275 (1984), opinion modified on other grounds, (Oct. 9, 1984).

Mortgagee had due process right to actual presale notice of foreclosure sale

Ala.—Special Assets, L.L.C. v. Chase Home Finance, L.L.C., 991 So. 2d 668 (Ala. 2007).

14 Del.—Riley v. Banks, 44 Del. 489, 62 A.2d 229 (Super. Ct. 1948).

15 Wis.—Weise v. City of Green Bay, 143 Wis. 198, 126 N.W. 681 (1910).

16 Ill.—People ex rel. Knight v. Chicago Title & Trust Co., 261 Ill. 392, 103 N.E. 997 (1913).

End of Document

16D C.J.S. Constitutional Law § 2197

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

3. Enforcement of Assessments for Public Improvements; Liability

§ 2197. Personal judgment regarding assessments for public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4066

A personal judgment for an assessment may not be rendered against a nonresident who has not appeared or been served with process within the state. The validity of a statute authorizing a personal judgment against resident owners may depend on whether or not the effect of the statute places a burden on property not benefited at all or imposes assessments materially in excess of benefits.

A personal judgment for an assessment may not, for want of jurisdiction, be rendered against a nonresident of the state who has not entered his or her appearance or been served with process within the state.[1] In addition, it has been found that a personal judgment for an assessment is void even against a resident owner, for the reason that assessments are based on the theory of special benefits to property and that a taking of the entire property and the imposition of personal liability in addition would constitute a clear case of confiscation.[2]

Where the effect of making an assessment for street improvements in a certain amount would be to exceed the entire value of the property assessed, including its enhanced value from benefits, the levy of an assessment in such amount, and for an additional amount as a personal liability against the owners, whereby other property of such owners, receiving no benefits from

the improvement, could be taken under execution, would constitute a taking of property without due process of law.[3] However, a statute authorizing personal judgment against a landowner for the amount of an assessment is not unconstitutional where it does not place a burden on property not affected or benefited by the improvement or authorize the levy of assessments materially in excess of benefits.[4]

Footnotes

1 U.S.—Dewey v. City of Des Moines, 173 U.S. 193, 19 S. Ct. 379, 43 L. Ed. 665 (1899).

2 S.D.—City of Brookings v. Natwick, 22 S.D. 322, 117 N.W. 376 (1908).

3 Tex.—Foxworth-Galbraith Lumber Co. v. Realty Trust Co., 110 S.W.2d 1164 (Tex. Civ. App. Amarillo 1937), dismissed.

4 Tex.—Foxworth-Galbraith Lumber Co. v. Realty Trust Co., 110 S.W.2d 1164 (Tex. Civ. App. Amarillo 1937), dismissed.

W. Va.—G. T. Fogle & Co. v. King, 132 W. Va. 224, 51 S.E.2d 776 (1948).

Joint assessments

A statute providing for a joint paving assessment against property jointly owned was found to provide for an assessment against the undivided interest of each cotenant and to impose a corresponding personal liability on each cotenant, and hence was not violative of the constitutional guaranty of due process, since personal liability is imposed only to the extent of benefits accruing to the cotenant, who has a right to discharge a lien against his or her interest by the payment of his or her portion of the assessment.

Tex.—Smithey v. Shambaugh, 126 Tex. 396, 88 S.W.2d 475 (Comm'n App. 1935).

End of Document

16D C.J.S. Constitutional Law § 2198

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

4. Reassessments and Curing Invalid Assessments for Public Improvements

§ 2198. Reassessments regarding public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4063

A reassessment of property for public improvements does not take property without due process of law, where there is no denial of notice and hearing, if required.

There is no violation of the due process requirement by a reassessment of property for the benefit of a public improvement where the original assessment is insufficient[1] or invalid,[2] where property subject to the assessment has been omitted,[3] or where the proceeds of the original assessment have been placed in a bank which has failed.[4] Furthermore, reassessments may be made without the violation of the guaranty of due process for the maintenance and repair of public improvements.[5] Thus, additional assessments or charges may be made according to the use of the improvement[6] to pay for maintenance[7] or further improvements necessary to the system.[8]

The validity of a reassessment is governed by the law in force at the time it is made, and it may, therefore, be valid, although it is not made in the manner prescribed by law at the time of the original assessment.[9] It has been found, however, that a reassessment

so as to include lands owned by the United States at the time of the improvement and original assessment, but subsequently alienated, is violative of due process.[10]

Footnotes

1 U.S.—Kadow v. Paul, 274 U.S. 175, 47 S. Ct. 561, 71 L. Ed. 982 (1927).
Mo.—State ex rel. McGee, for Use and Benefit of Drainage Dist. No. 4 of Dunklin County v. Wilson, 358 Mo. 1244, 220 S.W.2d 6 (1949).
Increase in amount of assessment does not violate due process
Ark.—Earle Road Imp. Dist. v. Johnson, 145 Ark. 438, 224 S.W. 965 (1920).
Ohio—Theobald v. Board of Com'rs of Fayette County, 119 Ohio St. 54, 6 Ohio L. Abs. 368, 162 N.E. 268 (1928).
Additional assessment
An additional front-foot assessment of property for a sanitary system was not violative of due process because of the previous assessment.
Md.—Washington Suburban Sanitary Commission v. Noel, 155 Md. 427, 142 A. 634 (1928).
Refunding by single bond issue
A statute providing that the obligations of two or more improvement districts be refunded by a single bond issue, requiring reassessment based on the benefits in the original proceedings, is not invalid.
Cal.—Los Angeles County v. Jones, 13 Cal. 2d 554, 90 P.2d 802 (1939).

2 Miss.—City of Clarksdale v. Fitzgerald, 181 Miss. 135, 179 So. 269 (1938).
Tex.—Booth v. Uvalde Rock Asphalt Co., 296 S.W. 345 (Tex. Civ. App. San Antonio 1927), writ refused, (Nov. 2, 1927).

3 U.S.—St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419, 36 S. Ct. 647, 60 L. Ed. 1072 (1916).

4 Mo.—State ex rel. Ross, to Use of Drainage District No. 8 of Pemiscot County v. General American Life Ins. Co., 336 Mo. 829, 85 S.W.2d 68 (1935).

5 Minn.—In re McRae, 93 Minn. 16, 100 N.W. 384 (1904).
Pro rata assessment
A statutory provision that the cost of repairs to an established drainage ditch will be assessed on a pro rata basis against all lands assessed benefits for the original construction of the ditch and not according to the actual benefits to the individual land resulting from a particular repair, does not violate the due process provisions of the state and federal constitutions.
Minn.—Petitions of Dudek, 244 Minn. 532, 70 N.W.2d 329 (1955).

6 Kan.—City of Lawrence v. Robb, 175 Kan. 495, 265 P.2d 317 (1954).
N.Y.—Tursellino v. Paduano, 202 Misc. 74, 107 N.Y.S.2d 839 (Sup 1951).

7 U.S.—Carson v. Sewer Com'rs of Brockton, 182 U.S. 398, 21 S. Ct. 860, 45 L. Ed. 1151 (1901).

8 N.Y.—Tursellino v. Paduano, 202 Misc. 74, 107 N.Y.S.2d 839 (Sup 1951).

9 U.S.—City of Seattle v. Kelleher, 195 U.S. 351, 25 S. Ct. 44, 49 L. Ed. 232 (1904).

10 U.S.—Lee v. Osceola & Little River Road Imp. Dist. No. 1 of Mississippi County, Ark., 268 U.S. 643, 45 S. Ct. 620, 69 L. Ed. 1133 (1925).

End of Document

16D C.J.S. Constitutional Law § 2199

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

4. Reassessments and Curing Invalid Assessments for Public Improvements

§ 2199. Reassessments regarding public improvements—Notice and hearing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4063

Reassessment procedure must preserve to the property owner the right to be heard and all the essentials of due process.

To be valid, a corrective reassessment procedure must preserve to the property owner his or her right to be heard and all the essentials of due process.[1] If the owner has, by reason of notice or otherwise, been properly made a party to the proceeding, no additional notice of the reassessment need be given to the owner.[2] Where one section of an act relating to assessments provides for notice to landowners, another section relating to the revision of assessments does not authorize the taking of property without due process because there is no provision in the latter section for notice.[3]

If the original assessments were determined by the legislature so as not to require notice, reassessment for repairs may be made without notice.[4] The owner of omitted property sought to be reassessed is not entitled to a hearing as to the amount of assessments on other property owners, which have been paid by them.[5] A statute authorizing reassessments for the invalidity of prior assessments does not deny due process to owners who did not receive notice and an opportunity for hearing until after the improvement was completed.[6] Accordingly, the mere fact that a hearing on reassessment comes only after the completion

of the project to which assessed charges related does not deprive the affected property owners of due process; the property owners' right to judicial review of the district's action is not affected by reassessment procedures, which provide the owners with the same right to appear and voice their support or opposition at the reassessment hearing as they enjoy in the original assessment proceedings.[7]

Footnotes

1 Wis.—Dittberner v. Windsor Sanitary Dist. Number 1, 209 Wis. 2d 478, 564 N.W.2d 341 (Ct. App. 1997).

2 Tenn.—Brite v. Grubbs, 144 Tenn. 647, 234 S.W. 759 (1921).

3 Ark.—Wimberly v. Road Imp. Dist. No. 7 in Polk County, 161 Ark. 79, 255 S.W. 556 (1923).
Mich.—Clark v. City of Royal Oak, 325 Mich. 298, 38 N.W.2d 413, 11 A.L.R.2d 1122 (1949).

4 Ind.—Board of Com'rs of Wells County v. Falk, 221 Ind. 376, 47 N.E.2d 320, 145 A.L.R. 1190 (1943).

5 U.S.—St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419, 36 S. Ct. 647, 60 L. Ed. 1072 (1916).

6 Miss.—City of Clarksdale v. Fitzgerald, 181 Miss. 135, 179 So. 269 (1938).

7 Wis.—Dittberner v. Windsor Sanitary Dist. Number 1, 209 Wis. 2d 478, 564 N.W.2d 341 (Ct. App. 1997).

16D C.J.S. Constitutional Law § 2200

Corpus Juris Secundum | June 2021 Update

Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VIII. Due Process in General; Procedural and Substantive Due Process; Access to Courts

XXII. Particular Applications of Due Process Guaranty

H. Public Improvements

4. Reassessments and Curing Invalid Assessments for Public Improvements

§ 2200. Curing invalid assessments for public improvements

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 4057, 4059

Assessments which are null and void, or which could not have been lawfully authorized, cannot be validated by a subsequent statute, nor can an unconstitutional assessment be validated by a popular vote; however, an assessment which the legislature could have authorized may be validated.

The legislature cannot validate an assessment which it could not originally have authorized, and a sale of land to satisfy such an assessment is a taking without due process of law notwithstanding an attempt by the legislature to validate it.[1] On the other hand, an assessment which the legislature could have authorized may be ratified by a subsequent statute if it could be authorized at the time of ratification,[2] and assessments which are not so arbitrary as to violate the requirement of due process may be validated.[3]

Where a statute makes no sufficient provision for notice to landowners and an opportunity to be heard, a purported curative statute cannot validate the assessment.[4] However, it has been found that a statute which is unconstitutional for failure to afford a hearing to owners of property in an improvement district may be validated by a statute validating the organization of the district.[5]

Where an act establishing a drainage and levee district is invalid for want of a definite description of the boundaries, and contracts by the district are void, the defect cannot be cured by a subsequent act purporting to abolish the district and directing a levy on the lands intended to be benefited for the preliminary expenses incurred under a contract.[6] Moreover, a special assessment which is void by reason of unconstitutionality of the statute under which it is levied cannot be validated by a popular vote.[7]

Footnotes

1 Cal.—Brady v. King, 53 Cal. 44, 1878 WL 1392 (1878).

2 U.S.—Charlotte Harbor & N. Ry. Co. v. Welles, 260 U.S. 8, 43 S. Ct. 3, 67 L. Ed. 100 (1922).

3 Fla.—Dover Drainage Dist. v. Pancoast, 102 Fla. 267, 135 So. 518 (1931).

4 U.S.—Thornton v. Road Imp. Dist. No. 1 of Clark County, Ark., 291 F. 518 (C.C.A. 8th Cir. 1923).
N.C.—City of Lexington v. Lopp, 210 N.C. 196, 185 S.E. 766 (1936).

5 Tex.—Sims v. State, 12 S.W.2d 540 (Tex. Comm'n App. 1929).

6 Ark.—Morgan Engineering Co. v. Cache River Drainage Dist., 122 Ark. 491, 184 S.W. 57 (1916).

7 Mich.—Anderson v. Hill, 54 Mich. 477, 20 N.W. 549 (1884).